

08:58AM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CISCO SYSTEMS, INC.,)	CV-14-5344-BLF
)	
PLAINTIFF,)	SAN JOSE, CALIFORNIA
)	
VS.)	NOVEMBER 21, 2016
)	
ARISTA NETWORKS, INC.,)	VOLUME 2
)	
DEFENDANT)	PAGES 25-260
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: DAVID A. NELSON
QUINN EMANUEL URQUHART & SULLIVAN, LLP
500 WEST MADISON STREET, SUITE 2450
CHICAGO, IL 60661

FOR THE PLAINTIFF: QUINN, EMANUEL, URQUHART & SULLIVAN
BY: SEAN PAK
50 CALIFORNIA STREET, 22ND FLOOR
SAN FRANCISCO, CALIFORNIA 94111

BY: DAVE NELSON
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APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

APPEARANCES (CONTINUED)

FOR THE DEFENDANT: KEKER & VAN NEST, LLP
BY: ROBERT ADDY VAN NEST
BRIAN FERRALL
MICHAEL KWUN
KEKER & VAN NEST LLP
633 BATTERY STREET
SAN FRANCISCO, CA 94111-1809

1 SAN JOSE, CALIFORNIA

NOVEMBER 21, 2016

2 P R O C E E D I N G S

08:59AM 3 (WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD OUT OF THE
09:00AM 4 PRESENCE OF THE PROSPECTIVE JURY:)

09:00AM 5 THE COURT: ALL RIGHT. LET'S CALL THE CASE. WE WILL
09:01AM 6 GET YOUR NAMES ON THE RECORD AND THEN WE WILL DIG IN.

09:01AM 7 THE CLERK: CALLING CV-14-5344-BLF. CISCO SYSTEMS,
09:01AM 8 INC. V. ARISTA NETWORKS, INC.

09:01AM 9 COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

09:01AM 10 MR. NELSON: GOOD MORNING, YOUR HONOR.

09:01AM 11 DAVE NELSON ON BEHALF OF CISCO. AND WITH ME IS MR. SEAN
09:01AM 12 PAK AND MS. KATHLEEN SULLIVAN.

09:01AM 13 THE COURT: GOOD MORNING TO ALL OF YOU.

09:01AM 14 MR. VAN NEST: GOOD MORNING, YOUR HONOR.

09:01AM 15 BOB VAN NEST FROM KECKER & VAN NEST FOR ARISTA. WE ARE
09:01AM 16 HERE WITH BRIAN FERRALL AND MICHAEL KWUN.

09:01AM 17 WE EXPECT DAVID SILBERT TO BE HERE SHORTLY, AND WE HAVE
09:01AM 18 INVITED PROFESSOR BLACK TO BE HERE IN THE COURTROOM. HE'S HERE
09:01AM 19 IN THE COURTROOM, BUT I TOLD HIM TODAY HE WILL LIKELY JUST BE A
09:01AM 20 SPECTATOR, BUT HE IS HERE, YOUR HONOR.

09:01AM 21 THE COURT: I APPRECIATE THAT. THANK YOU.

09:01AM 22 ALL RIGHT. PLEASE BE SEATED.

09:01AM 23 LET ME SEE IF I CAN JUST MAKE SURE I UNDERSTAND -- WE ALL
09:01AM 24 UNDERSTAND EXACTLY WHAT WE ARE TRYING TO ACCOMPLISH THIS
09:01AM 25 MORNING.

09:01AM 1 THIS IS THE TIME I BELIEVE WE HAVE SET FOR THE DISCUSSION
09:01AM 2 AND ARGUMENT ON THE PORTIONS OF ANALYTIC DISSECTION THAT THE
09:02AM 3 COURT CAN COMPLETE WITHOUT EVIDENTIARY HEARING. AND THAT THE
09:02AM 4 EVIDENTIARY HEARING REQUIRED WILL TAKE PLACE ALONG WITH THE
09:02AM 5 TRIAL, WITH THE JURY PRESENT.

09:02AM 6 AND THAT BEFORE I FINALLY INSTRUCT THE JURY, WE WILL HAVE
09:02AM 7 COMPLETED ALL OF THE ANALYTIC DISSECTION; IS THAT CORRECT?

09:02AM 8 MR. VAN NEST: THAT'S WHAT WE UNDERSTOOD, YOUR HONOR.

09:02AM 9 MR. NELSON: I BELIEVE THAT'S RIGHT.

09:02AM 10 I BELIEVE WE ALSO TALKED FRIDAY ABOUT MAYBE THEY WANTED
09:02AM 11 SOME ADDITIONAL DISCUSSION ON THE DEFINITION OF THE WORK.

09:02AM 12 THE COURT: WELL, IT WOULD BE MY HOPE TODAY THAT WE
09:02AM 13 COULD ALSO DEFINE WHAT THE WORKS ARE. AND OF COURSE THERE'S
09:02AM 14 MORE THAN ONE THAN YOU ARE ASSERTING. AND I THINK THAT WILL
09:02AM 15 HELP QUITE A BIT AS WE DISCUSS JURY INSTRUCTIONS.

09:02AM 16 YOU KNOW, WE'VE REALLY -- I'VE SET ASIDE ALL DAY TODAY AND
09:02AM 17 TOMORROW. I DON'T KNOW WHAT WE WILL NEED. WHEN WE TURN TO
09:02AM 18 JURY INSTRUCTIONS, WE WILL DO THAT IN CHAMBERS BECAUSE WE HAVE
09:02AM 19 A LOT OF ROLL-UP-YOUR-SLEEVES KIND OF WORK TO DO THERE, AND I'M
09:02AM 20 HOPING TO GET A PRETTY GOOD SET OF JURY INSTRUCTIONS BY THE END
09:03AM 21 OF THE DAY TOMORROW, WITH THE EXCEPTION THAT A FEW THAT ARE
09:03AM 22 STILL WORKS IN PROGRESS. BUT THEN WE HAVE A REALISTIC CHANCE
09:03AM 23 OF GETTING THOSE HAMMERED OUT SO THAT THE JURY CAN START THEIR
09:03AM 24 DELIBERATIONS AS WE HAD HOPED ON DECEMBER 13TH. SO THAT'S
09:03AM 25 STILL OUR PLAN.

09:03AM 1 WITH THAT IN MIND, LET MY -- I'M NOT SURE HOW YOU HAD
09:03AM 2 WANTED TO ORGANIZE THE DISCUSSION TUESDAY -- THE PAPER YOU
09:03AM 3 PROVIDED TO ME, I KNOW THERE'S LOTS OF OTHER THINGS THAT YOU
09:03AM 4 SENT ME ON THE THUMB DRIVE, AND OF COURSE THAT'S NOT ACCESSIBLE
09:03AM 5 TO ME IN THE COURTROOM, I KNOW YOU WILL HELP ME THROUGH THAT.

09:03AM 6 IT SEEMS TO ME THAT PRIMARILY, CISCO'S IDENTIFICATION THE
09:03AM 7 ALLEGED COPIED ELEMENTS IS ESSENTIAL HERE. AND WHAT I HAVE
09:04AM 8 BEEN WORKING WITH IS THE JOINT SUBMISSION OF THE ITEMS THAT CAN
09:04AM 9 BE SUBMITTED WITHOUT ARGUMENT THAT TRACK ARISTA'S RESPONSE TO
09:04AM 10 CISCO'S SUBMISSION OF PROTECTABLE ELEMENTS.

09:04AM 11 AND SO MR. VAN NEST, I DON'T KNOW WHETHER YOU HAD INTENDED
09:04AM 12 TO WALK THROUGH THAT LIST OR IF YOU HAVE A DIFFERENT WAY OF
09:04AM 13 ORGANIZING THIS FOR ME TODAY.

09:04AM 14 MR. VAN NEST: I HAD A SLIDE HERE FOR SUGGESTION.
09:04AM 15 AND THAT IS THAT WE START WITH DEFINING WHAT THE WORK AS A
09:04AM 16 WHOLE IS.

09:04AM 17 THE COURT: OKAY.

09:04AM 18 MR. VAN NEST: REMEMBER THAT AT THE MOTION IN LIMINE
09:04AM 19 SESSION WE HAD MOVED IN LIMINE THE QUESTION OF WHAT WAS
09:04AM 20 ACTUALLY DISCLOSED. AND SO THAT WAS CARRIED OVER TO TRIAL.

09:04AM 21 SO WHAT WE HAVE DONE IS WE HAVE DIVIDED IT UP A LITTLE BIT.
09:04AM 22 WE THINK THERE'S TWO ISSUES: WHAT WAS DISCLOSED AS THE
09:04AM 23 COPYRIGHTED WORK, AND MR. FERRALL IS GOING TO ADDRESS THAT; AND
09:04AM 24 WHETHER SOME SUBSET OF A COPYRIGHTED REGISTRATION IS ELIGIBLE
09:04AM 25 TO BE THE WORK AS A WHOLE.

09:04AM 1 AND YOU HAD MENTIONED FRIDAY THAT YOU WERE FAMILIAR WITH
09:04AM 2 THE LAW.

09:04AM 3 THE COURT: I HOPE I AM.

09:05AM 4 MR. VAN NEST: AND MR. KWUN WAS GOING TO HANDLE THAT.

09:05AM 5 SO WHAT I SUGGEST WE DO IS, START WITH MR. FERRALL, IS THE
09:05AM 6 DISCOVERY ISSUES BECAUSE THEY ARE VERY IMPORTANT, AND THEN
09:05AM 7 FOLLOW ON WITH THE DISCUSSION OF THE LAW AND THE LEGAL POINTS.
09:05AM 8 EVEN IF YOUR HONOR WERE TO SAY, WELL, IT WAS DISCLOSED, THEN I
09:05AM 9 THINK THERE'S A SECOND QUESTION WHICH IS, WHAT DOES THE LAW
09:05AM 10 ALLOW IN TERMS OF A SUBSET TYPE OF APPROACH?

09:05AM 11 THE COURT: OKAY. AND I'M PERFECTLY HAPPY TO DO
09:05AM 12 THAT.

09:05AM 13 I THINK THE BEST PLACE TO START OUT IS FOR CISCO TO STATE
09:05AM 14 ON THE RECORD WHAT IT BELIEVES THE WORKS ARE THAT IT IS GOING
09:05AM 15 FORWARD WITH.

09:05AM 16 MR. PAK.

09:05AM 17 MR. PAK: YES, YOUR HONOR. AND YOUR HONOR, I HAVE
09:06AM 18 COPIES OF THE SLIDES.

09:06AM 19 THE COURT: AND THOSE ARE ALWAYS HELPFUL. THANK YOU.

09:06AM 20 AND PARDON ME, I MAY BE LOOKING AT THESE WHILE YOU ARE
09:06AM 21 TALKING. I MAY NOT MAKE THE KIND OF EYE CONTACT THAT WOULD
09:06AM 22 APPEAR THAT I'M LISTENING, BUT I'M DOING MY BEST.

09:06AM 23 MR. PAK: SO YOUR HONOR, WE HAVE PUT TOGETHER A
09:06AM 24 SERIES OF SLIDES THAT WILL WALK US THROUGH THE DISCUSSION. I
09:06AM 25 THINK IT WILL FOLLOW INTO THE FOLLOWING SETS OF ARGUMENTS.

09:06AM 1 ONE IS, AT A VERY HIGH LEVEL I KNOW YOUR HONOR HAS SEEN THE
09:06AM 2 CASE LAW, BUT JUST TO REMIND EVERYONE ON THE RECORD WHAT THE
09:06AM 3 LAW IS WITH RESPECT TO THE SEPARATE REGISTRATION OF USER
09:06AM 4 INTERFACE VERSUS THE SOURCE CODE WHEN ONE TAKES A COMPUTER
09:06AM 5 PROGRAM AND FILES THE REGISTRATION PAPERWORK WITH THE COPYRIGHT
09:06AM 6 OFFICE. I WILL COVER THAT VERY BRIEFLY.

09:07AM 7 AND YOUR HONOR, I DO WANT TO GO THEN THROUGH THE DIFFERENT
09:07AM 8 DISCLOSURES THAT WE MADE IN THE CASE. DIFFERENT STATEMENTS
09:07AM 9 HAVE BEEN MADE BY THE EXPERTS ON BOTH SIDES. PARTICULARLY, I
09:07AM 10 THINK WHAT'S REALLY IMPORTANT IS TO UNDERSTAND HOW ARISTA'S OWN
09:07AM 11 EXPERTS HAVE UNDERSTOOD THE COPYRIGHTS AT ISSUE TO BE BECAUSE
09:07AM 12 THAT BECOMES A FOUNDATION FOR A NUMBER OF OPINIONS AND SOME
09:07AM 13 DEFENSES THAT ARISTA HAS RAISED.

09:07AM 14 SO I THINK ONCE WE UNDERSTAND THAT PICTURE, THEN I WILL
09:07AM 15 STATE ON THE RECORD, YOUR HONOR, EXACTLY WHAT IT IS THAT WE ARE
09:07AM 16 CLAIMING TO BE, IN THIS CASE, REALLY, THE FOUR OPERATING SYSTEM
09:07AM 17 USER INTERFACES, HOW THEY WERE DISCLOSED, AND MAKE THAT VERY
09:07AM 18 CLEAR ON THE RECORD.

09:07AM 19 THE COURT: THAT WILL BE VERY HELPFUL.

09:07AM 20 AND SO THAT -- I WANT MR. VAN NEST TO BE CLEARLY SPEAKING
09:07AM 21 TO WHAT YOU ALLEGE THE WORKS TO BE SO THAT THE RECORD IS CLEAR
09:07AM 22 FOR ALL OF US.

09:07AM 23 MR. PAK: GREAT.

09:07AM 24 SO I THINK THE STARTING POINT, YOUR HONOR, IS THE CASE OF
09:07AM 25 MANUFACTURERS TECH V. CAMS, THIS IS CONNECTICUT CASE IN 1989.

09:08AM 1 THE COURT LOOKED AT ALL OF THE VARIOUS POLICY ARGUMENTS AND
09:08AM 2 WHAT HAPPENED WITH RESPECT TO THE CHANGE IN POLICY AT THE
09:08AM 3 COPYRIGHT OFFICE.

09:08AM 4 AND WHAT THIS CASE HOLDS IS THAT THIS COURT ADOPTS THE
09:08AM 5 APPROACH TO TREAT THE SINGLE REGISTRATION OF THE COMPUTER
09:08AM 6 PROGRAM AS ACCOMPLISHING TWO INTERRELATED YET DISTINCT
09:08AM 7 REGISTRATIONS.

09:08AM 8 ONE OF THE PROGRAM ITSELF AND ONE OF THE SCREEN DISPLAYS OR
09:08AM 9 THE USER INTERFACE OF THAT PROGRAM. AND IT ALSO RECOGNIZES
09:08AM 10 THAT A COMPUTER PROGRAM AND ITS SCREEN DISPLAYS ARE, FOR
09:08AM 11 COPYRIGHT PURPOSES, FUNDAMENTALLY DISTINCT.

09:08AM 12 AND I THINK IF YOUR HONOR READS THAT OPINION, AND THERE ARE
09:08AM 13 A NUMBER OF DISTRICT COURTS THAT HAVE FOLLOWED THIS APPROACH,
09:08AM 14 THE COURT REALLY ADOPTS MULTIPLE BASIS FOR ITS POSITION.

09:08AM 15 ONE IS JUST THE PRACTICAL REALITY THAT ITS COMPUTER
09:08AM 16 PROGRAMS BECOME MORE COMPLICATED. THESE PROGRAMS ARE
09:08AM 17 GENERATING, LITERALLY, HUNDREDS OF THOUSANDS OF SCREEN SHOTS,
09:09AM 18 OR MILLIONS POTENTIALLY, DEPENDING ON THE COMPLEXITY OF THE
09:09AM 19 PROGRAM.

09:09AM 20 AND PRIOR TO THE COPYRIGHT POLICY CHANGE, AS A COMPUTER
09:09AM 21 PROGRAM, YOU COULD EITHER REGISTER THE CODE OR YOU COULD ALSO
09:09AM 22 SEPARATELY REGISTER THE SCREEN DISPLAYS. BUT AS THE NUMBER OF
09:09AM 23 SCREEN DISPLAYS INCREASED, IT BECAME PRACTICALLY IMPOSSIBLE TO
09:09AM 24 REGISTER ALL THE DIFFERENT POSSIBLE SCREENS. AND SOME OF THESE
09:09AM 25 SCREENS DEPENDS ON HOW YOU THE USER INTERACTS WITH THE SYSTEM.

09:09AM 1 SO THAT WAS ALSO A RECOGNITION IN THIS ORDER THAT WHEN YOU
09:09AM 2 HAVE THE USER PROVIDING INPUT, AND THAT'S PART OF WHAT YOU ARE
09:09AM 3 SEEING ON THE SCREEN, IT REALLY DOES BECOME VERY, VERY
09:09AM 4 DIFFICULT TO TRY TO REGISTER ALL THE DIFFERENT PERMUTATIONS.

09:09AM 5 THERE'S ALSO A BASIC, I THINK A POLICY REASON TO DO THIS,
09:09AM 6 WHICH IS THE COURT RECOGNIZED THAT THE SAME USER SCREEN COULD
09:09AM 7 BE IMPLEMENTED USING DIFFERENT CODE. AND IN FACT, THERE'S SUCH
09:09AM 8 A PROLIFERATION OF DIFFERENT TYPE OF PROGRAMMING LANGUAGES,
09:10AM 9 PROGRAMMING TECHNIQUES THAT, FROM A USER PERSPECTIVE, YOU COULD
09:10AM 10 HAVE AN IDENTICAL PROGRAM IN TERMS OF THE USER EXPERIENCE
09:10AM 11 THAT'S BEEN IMPLEMENTED USING, FOR EXAMPLE THE C++ PROGRAM
09:10AM 12 LANGUAGE VERSUS JAVA VERSUS DIFFERENT KINDS OF LIBRARIES AND
09:10AM 13 TOOLS.

09:10AM 14 SO THE RECOGNITION WAS THAT WE SHOULDN'T ALLOW THE SAME
09:10AM 15 PROGRAM EFFECTIVELY TO BE CLONED SIMPLY BECAUSE THE INFRINGER
09:10AM 16 HAD USED A DIFFERENT PROGRAMMING LANGUAGE OR A SET OF DIFFERENT
09:10AM 17 LIBRARY TOOLS. SO THAT, I THINK, WAS ALSO PART OF THIS COURT'S
09:10AM 18 OPINION.

09:10AM 19 JUST TO BE CLEAR, THAT'S NOT THE ONLY COURT, THIS IS ON
09:10AM 20 SLIDE 3, WE HAVE CITED A NUMBER OF CASES, CLARITY SOFTWARE
09:10AM 21 CASE, FROM PENNSYLVANIA THAT QUOTES AND RELIES ON CAMS, AND
09:10AM 22 THEY RECOGNIZED THE SAME LEGAL PRINCIPLE AND POLICY BASIS FOR
09:10AM 23 THIS DECISION.

09:10AM 24 WE HAVE THE JAMISON CASE FROM THE EASTERN DISTRICT OF NEW
09:10AM 25 YORK. THE HARBOR SOFTWARE CASE FROM THE SOUTHERN DISTRICT OF

09:10AM 1 NEW YORK, AND ALSO THE NAPOLI CASE WHICH CAME OUT OF THE
09:10AM 2 NORTHERN DISTRICT --

09:11AM 3 THE COURT: NO COURTS IN THE NINTH CIRCUIT HAVE HAD
09:11AM 4 THE OCCASION TO RULE ON THIS?

09:11AM 5 MR. PAK: I THINK THE NINTH CIRCUIT HASN'T, TO MY
09:11AM 6 KNOWLEDGE, AT THE DISTRICT COURT LEVEL, HAVE DEALT WITH THIS
09:11AM 7 PARTICULAR ISSUE. BUT OBVIOUSLY WE HAVE CASES LIKE THE
09:11AM 8 SYNOPSIS CASE AND OTHER CASES THAT HAVE FOCUSED JUST ON THE
09:11AM 9 USER INTERFACE ELEMENTS.

09:11AM 10 THE COURT: WHAT WAS THE DEFINITION OF THE WORK IN
09:11AM 11 THE SYNOPSIS CASE.

09:11AM 12 MR. PAK: I BELIEVE IT WAS THE COMMAND SET AND THE
09:11AM 13 SYNTAX, THAT WAS THE DEFINITION OF THE WORK.

09:11AM 14 THE COURT: THAT WOULD BE A SUBSET OF THE USER
09:11AM 15 INTERFACE?

09:11AM 16 MR. PAK: I BELIEVE SO.

09:11AM 17 THE COURT: YOU WEREN'T INVOLVED IN THAT CASE?

09:11AM 18 MR. PAK: I WAS NOT INVOLVED IN THE SYNOPSIS CASE SO
09:11AM 19 I APOLOGIZE, I'M GOING OFF OF WHAT I HAD JUST READ.

09:11AM 20 THE COURT: I DIDN'T BELIEVE YOU HAD BEEN INVOLVED IN
09:11AM 21 IT BUT YOU HAVE OBVIOUSLY STUDIED THE DOCKET.

09:11AM 22 MR. PAK: I HAVE STUDIED THE DOCKET, BUT THERE MAY BE
09:11AM 23 THINGS IN THE CONFIDENTIAL RECORD THAT WE DON'T HAVE ACCESS TO.

09:11AM 24 THE NAPOLI CASE, YOUR HONOR, THAT WAS VACATED DUE TO A
09:11AM 25 SETTLEMENT AGREEMENT. THERE WAS NO SUBSTANTIVE ANALYSIS OR

09:11AM 1 OVERTURNING OF THAT DECISION.

09:11AM 2 THE COURT: AND THE NAPOLI CASE IS THE ONE YOU HAVE
09:11AM 3 CITED, I THINK.

09:12AM 4 MR. PAK: THAT'S RIGHT.

09:12AM 5 AND WE HAVE ALSO CITED THE MANUFACTURERS TECH CASE. THE
09:12AM 6 NAPOLI CASE ACTUALLY CITES THE MANUFACTURERS TECH CASE AND
09:12AM 7 MAKES IT PART OF ITS HOLDING AS WELL.

09:12AM 8 SO ON SLIDE 4, YOUR HONOR, I THINK WE ARE ALL IN AGREEMENT
09:12AM 9 NOW THAT THE ACT OF REGISTERING A COPYRIGHT DOESN'T DEFINE THE
09:12AM 10 WORK, NECESSARILY, AND THAT'S FOR MULTIPLE REASONS.

09:12AM 11 COPYRIGHT BECOMES PART OF THE WORK OR THE WORK BECOMES
09:12AM 12 PROTECTED BY COPYRIGHT AT THE TIME OF CREATION OF THAT WORK.
09:12AM 13 AND THE REGISTRATION REALLY IS A STANDING ISSUE AS TO WHETHER
09:12AM 14 YOU COULD SUE ON THAT COPYRIGHTED WORK BY MAKING THE FILINGS
09:12AM 15 WITH THE REGISTRATIONS.

09:12AM 16 AND EVEN ARISTA ACKNOWLEDGES IN ITS BRIEF AT ECF 635,
09:12AM 17 PAGE 2, FOR EXAMPLE, CISCO CAN ASSERT ITS SEPARATE MANUALS,
09:12AM 18 INDEPENDENT DOCUMENTS AS DISCREET WORKS, ALTHOUGH THEY WERE
09:12AM 19 REGISTERED ALONG WITH THE OPERATING SYSTEMS.

09:12AM 20 SO THERE WILL BE SOME DISCUSSION, I BELIEVE, ABOUT VARIOUS
09:13AM 21 DISCOVERY RESPONSES OR STATEMENTS BY WITNESSES AND EXPERTS AS
09:13AM 22 TO WHAT WAS IT THAT WAS ACTUALLY FILED WITH THE COPYRIGHT
09:13AM 23 OFFICE.

09:13AM 24 AND I THINK IT'S FACTUALLY CORRECT TO SAY THAT WHAT WE
09:13AM 25 FILED WERE THE OPERATING SYSTEM-RELATED DOCUMENTS AS WELL AS

09:13AM 1 THE SOURCE CODE. THAT'S THE -- WHAT WAS THE REGISTERED WORK IN
09:13AM 2 THE SENSE OF REGISTRATION.

09:13AM 3 THE COURT: SURE.

09:13AM 4 AND NO ONE -- ARISTA DOESN'T CONTEST THAT THE IOS IS
09:13AM 5 COPYRIGHTED, SUBJECT TO A REGISTRATION.

09:13AM 6 MR. PAK: THAT'S RIGHT, YOUR HONOR.

09:13AM 7 AND I THINK THE --

09:13AM 8 THE COURT: AND EACH OF ITS VERSIONS, OF COURSE.

09:13AM 9 MR. PAK: THAT'S RIGHT.

09:13AM 10 AND SO ULTIMATELY WHAT CISCO IS CONTENDING IN THIS CASE,
09:13AM 11 WHAT WE ARE CONTENDING, YOUR HONOR, IS THAT THAT ACT OF
09:13AM 12 REGISTERING THE OPERATING SYSTEM, ALONG WITH THE DOCUMENTS,
09:13AM 13 GAVE RISE TO A NUMBER OF DISTINCT REGISTRATION FOR PURPOSES OF
09:13AM 14 ENFORCEMENT OR LITIGATION, THAT WE CAN THEN USE THAT
09:13AM 15 REGISTRATION AS A BASIS TO ASSERT, FOR EXAMPLE, THE
09:13AM 16 DOCUMENT-BASED COPYRIGHTS THAT WE HAVE. WE COULD ALSO CHOOSE
09:13AM 17 TO ASSERT THE USER INTERFACE RELATED COPYRIGHTS THAT WE HAVE.

09:14AM 18 AND IF THE CASE INVOLVED SOURCE CODE COPYING, WE COULD HAVE
09:14AM 19 ALSO ASSERTED THE SOURCE CODE COPYING COPYRIGHTS AS WELL. BUT
09:14AM 20 THAT THESE ARE A BUNDLE OF RIGHTS THAT WE HAVE, AND WE COULD
09:14AM 21 CHOOSE TO SELECT -- WE COULD CHOOSE TO ASSERT ALL OF THEM
09:14AM 22 TOGETHER OR IN INDIVIDUAL PIECEMEAL FASHION.

09:14AM 23 THE COURT: WELL, IT SEEMS THAT ARISTA ARGUES THAT
09:14AM 24 THAT'S THE OPERATING SYSTEM AS A WHOLE, WHICH WOULD INCLUDE
09:14AM 25 BOTH THE SOURCE CODE AND THE USER INTERFACE. SO I DON'T THINK

09:14AM 1 THERE'S ANY QUESTION THAT THE USER INTERFACE IS PROTECTED IN
09:14AM 2 THE REGISTRATIONS, IT'S JUST WHETHER IT CAN BECOME IT'S OWN
09:14AM 3 WORK SEPARATE FROM THE SOURCE CODE.

09:14AM 4 MR. PAK: THAT'S CORRECT, YOUR HONOR.

09:14AM 5 THE COURT: AND IT DOESN'T SEEM LIKE IT'S THAT
09:14AM 6 DIFFICULT A DECISION HERE.

09:14AM 7 MR. PAK: I DON'T THINK SO, YOUR HONOR.

09:14AM 8 I THINK WHEN YOU LOOK AT THE LAW MADE, AND I'M SURE WE WILL
09:14AM 9 HEAR FROM COUNSEL FOR ARISTA, BUT SETTING ASIDE SOME POLICY
09:14AM 10 STATEMENTS FROM THE COPYRIGHT OFFICE WHICH CAN BE INTERPRETED
09:14AM 11 IN A NUMBER OF DIFFERENT WAYS, I DON'T THINK THERE'S BEEN ANY
09:14AM 12 CASE LAW CITED BY ARISTA THAT REALLY CONTRADICTS THIS
09:14AM 13 MANUFACTURING TECH LINE OF CASES AND THE WAY THE DISTRICT
09:15AM 14 COURTS HAVE TREATED USER INTERFACE AS A SEPARATE COPYRIGHTABLE
09:15AM 15 WORK.

09:15AM 16 SO REALLY, I THINK PART OF THE DISCUSSION WE ARE HAVING IS
09:15AM 17 REALLY THE DISCOVERY PROCESS AND WHAT CISCO HAS ALLEGED FROM
09:15AM 18 THE VERY BEGINNING OF THE CASE IN TERMS OF FILING OF THE
09:15AM 19 COMPLAINT TO THE DISCOVERY RESPONSES THAT WERE MADE, TO THE
09:15AM 20 EXPERT OPINIONS THAT WERE RENDERED. AND I THINK IMPORTANTLY,
09:15AM 21 WHAT WERE THE DEFENSES ARISTA HAS ADVANCED IN THIS CASE, BASED
09:15AM 22 ON THE DISCLOSURES CISCO MADE.

09:15AM 23 AND AS YOUR HONOR KNOWS, RULE 26 IS REALLY A DISCOVERY
09:15AM 24 NOTICE RULE, AND THE IDEA IS HAVE I REASONABLY OR FAIRLY PUT
09:15AM 25 THE OTHER SIDE ON NOTICE OF MY THEORIES. I THINK WE ALL

09:15AM 1 RECOGNIZE THAT YOU DON'T HAVE TO SPELL OUT IN EXACTLY THE SAME
09:15AM 2 WAY, YOUR CLAIMS, OR USE EXACTLY THE SAME TYPE OF EVIDENCE AS
09:15AM 3 YOU WOULD PRESENT AT TRIAL. THE REAL QUESTION IS, HAVE WE PUT
09:15AM 4 THE OTHER SIDE FAIRLY ON NOTICE THAT WE, CISCO, HAVE BELIEVED
09:16AM 5 THAT COPYRIGHTABLE USER INTERFACE, OR SOMETIMES WE CALL IT THE
09:16AM 6 CLI, IS SOMETHING THAT IS DISTINCT AND IT'S SOMETHING WE
09:16AM 7 BELIEVE WAS COPIED AND SOMETHING THAT WAS COPYRIGHTED.

09:16AM 8 SO I WOULD LIKE TO START ON SLIDE 5, REALLY, FROM THE PUNCH
09:16AM 9 LINE, WHICH IS, LET'S LOOK AT THE SWORN OPINIONS OF THEIR TWO
09:16AM 10 EXPERTS IN THIS CASE, THE TWO PRIMARY EXPERTS.

09:16AM 11 FIRST OF ALL, WE START WITH MS. CATE ELSTEN WHO IS ARISTA'S
09:16AM 12 DAMAGES OTHER EXPERT. AND I'M QUOTING FROM ELSTEN REBUTTAL
09:16AM 13 REPORT AT PAGE 92 WHICH WAS FILED IN JULY OF 2016.

09:16AM 14 AS STATED IN SECTION 3(C) (1) (B) OF THIS REPORT, I
09:16AM 15 UNDERSTAND THAT THE COPYRIGHTS AT ISSUE DO NOT RELATE TO THE
09:16AM 16 IMPLEMENTATION OF THE CLI. WHICH IS EXECUTED BY UNDERLYING
09:16AM 17 SOURCE CODE, NOT IN DISPUTE IN THIS MATTER.

09:17AM 18 SO IT CANNOT BE ANYMORE CLEAR WHAT SHE SAID. SHE SAID THE
09:17AM 19 COPYRIGHTS AT ISSUE DO NOT CONCERN THE SOURCE CODE.

09:17AM 20 THEN SHE GOES ON TO SAY THAT THE ARISTA EOS SOURCE CODE WAS
09:17AM 21 INDEPENDENTLY DEVELOPED BY ARISTA'S ENGINEERS. AND THE SECOND
09:17AM 22 AMENDED COMPLAINT DOES NOT ALLEGE THAT ARISTA COPIED ANY OF THE
09:17AM 23 CLI SOURCE CODE.

09:17AM 24 NOW THIS IS NOT A STATEMENT IN ISOLATION OR IN A VACUUM.
09:17AM 25 THE REASON WHY SHE'S MAKING THIS STATEMENT SO CLEARLY AS SHE

09:17AM 1 HAS, AS YOUR HONOR KNOWS, A DISGORGEMENT OPINION. SO HER JOB
09:17AM 2 ON BEHALF OF ARISTA AS A DAMAGES EXPERT IS TO APPORTION OUT
09:17AM 3 WHAT SHE BELIEVES IS THE VALUE OF THE COPYRIGHTED WORK AT ISSUE
09:17AM 4 VERSUS OTHER TECHNOLOGIES THAT WERE DEVELOPED BY ARISTA,
09:17AM 5 SETTING ASIDE THE COPYRIGHTED WORK.

09:17AM 6 SO IN ORDER TO DO THAT DISGORGEMENT ANALYSIS, WHAT SHE DOES
09:17AM 7 IS SHE VALUES THE CLI OR THE USER INTERFACE AND SAYS, THAT IS
09:17AM 8 WORTH, FOR EXAMPLE AT THE BOTTOM HERE, \$16.4 MILLION, IN HER
09:18AM 9 OPINION.

09:18AM 10 AND THEN HE SAYS THE REST OF THE PROFITS THAT ARISTA HAS
09:18AM 11 GAINED BY SELLING THE EOS SOFTWARE AND THE CODE AND THE
09:18AM 12 SWITCHES SHOULD BE APPORTIONED OUT.

09:18AM 13 SO TWO -- SO THIS IS A VERY IMPORTANT PART OF HER
09:18AM 14 APPORTIONMENT OR DISGORGEMENT ANALYSIS IS TO BE ABLE TO TREAT
09:18AM 15 THE CLI AS A SEPARATE COPYRIGHTABLE WORK SO THEN SHE CAN TURN
09:18AM 16 AROUND AND THEN SAY THESE OTHER THINGS ARE NOT AT ISSUE IN THIS
09:18AM 17 CASE, SHOULD BE APPORTIONED OUT.

09:18AM 18 SO WE SEE THAT OPINION STATED ON THE VERY NEXT PAGE, ELSTEN
09:18AM 19 REBUTTAL REPORT 92 TO 93, "BASED ON CURRENTLY AVAILABLE
09:18AM 20 INFORMATION IN MY ANALYSIS, IN CONSIDERATIONS AS OUTLINED
09:18AM 21 ABOVE, I HAVE CONCLUDED THAT THE PORTION OF ARISTA'S U.S.
09:18AM 22 SWITCH PROFITS FROM DECEMBER 2011 THROUGH MARCH 2016, MAY BE
09:18AM 23 REASONABLY CONSIDERED ATTRIBUTABLE TO THE CLI IS
09:18AM 24 \$16.4 MILLION."

09:18AM 25 AND THEN SHE SAYS, "FURTHER APPORTION MAY BECOME POSSIBLE

09:19AM 1 BASED ON THE COURT'S RULING AS TO WHAT PORTIONS OF THE ARISTA
09:19AM 2 EOS CLI ARE COVERED BY THE COPYRIGHTS AT ISSUE. AND SUCH
09:19AM 3 APPORTIONMENT MAY HAVE A MATERIAL IMPACT ON THE FINAL NUMBER."

09:19AM 4 IT'S VERY CLEAR, SHE'S ALREADY DONE THE APPORTIONMENT BASED
09:19AM 5 ON THE USER INTERFACE AS A SEPARATELY COPYRIGHTABLE WORK. AND
09:19AM 6 THEN SHE'S SAYING BASED ON WHAT WE DO WITH DISSECTION, THAT SHE
09:19AM 7 MAY HAVE FURTHER OPINIONS FOR APPORTIONMENT BASED ON THAT
09:19AM 8 OPINION.

09:19AM 9 WE ALSO HAVE PROFESSOR JOHN BLACK, WHO IS SITTING HERE IN
09:19AM 10 THE COURTROOM, AND HE IS ARISTA'S TECHNICAL EXPERT. AND DOCTOR
09:19AM 11 BLACK ALSO MAKES THE SAME STATEMENTS ABOUT WHAT IS THE
09:19AM 12 COPYRIGHTABLE WORK AT ISSUE. THIS IS DOCTOR BLACK, JUNE 3RD,
09:19AM 13 2016. AND IN THAT REPORT HE'S PROVIDING A NUMBER OF OPINIONS
09:19AM 14 AND HE SAYS, "THE ASPECTS OF THE CISCO CLI OVER WHICH CISCO
09:19AM 15 ASSERTS COPYRIGHT PROTECTION IN THIS LITIGATION," AND THEN HE
09:20AM 16 GOES ON TO SAY, "NAMELY THE ASSERTED COMMAND MODES, PROMPTS,
09:20AM 17 COMMANDS, COMMAND HIERARCHIES AND COMMAND RESPONSES."

09:20AM 18 AND WHY DOES DOCTOR BLACK SAY THAT? AGAIN HE'S NOT SAYING
09:20AM 19 THAT IN ISOLATION, HE'S SAYING IT TO SUPPORT ONE OF HIS MAJOR
09:20AM 20 OPINIONS IN THIS CASE, AND THAT HAS TO DO WITH THE
09:20AM 21 TRANSFORMATIVE USE.

09:20AM 22 SO DOCTOR BLACK, AS ARISTA'S TECHNICAL EXPERT, WAS TASKED
09:20AM 23 WITH THE QUESTION OF ANALYZING, WAS THERE A TRANSFORMATION OF
09:20AM 24 THE COPYRIGHTED WORK AT ISSUE WHEN ARISTA IMPLEMENTED IT USING
09:20AM 25 DIFFERENT CODE?

09:20AM 1 SO AGAIN, THIS IS IN THE SAME REPORT, PAGE -- OR
09:20AM 2 PARAGRAPH 673, HE SAYS, "I HAVE TAKEN -- UNDERTAKEN ON THE
09:20AM 3 EVALUATION OF THE PURPOSE AND CHARACTER OF THE USE OF THE
09:20AM 4 ASSERTED CLI ASPECTS IN RELATION TO THE REGISTERED WORKS. IN
09:20AM 5 PARTICULAR, I HAVE CONSIDERED WHETHER THE ALLEGED INFRINGEMENT
09:20AM 6 IS A TRANSFORMATIVE USE OF THE ASSERTED PROTECTED EXPRESSION.

09:21AM 7 BASED UPON ALL OF MY OBSERVATIONS SET FORTH ABOVE, IT IS MY
09:21AM 8 OPINION THAT ARISTA'S ALLEGED USE OF THE ASSERTED CLI ASPECTS
09:21AM 9 IS TRANSFORMATIVE BECAUSE OF THE FUNDAMENTALLY DIFFERENT AND
09:21AM 10 NOVEL ARISTA HARDWARE AND SOFTWARE THAT ARISTA DEVELOPED
09:21AM 11 INDEPENDENTLY, AND BECAUSE THE ASSERTED CLI ASPECTS ARE MERELY
09:21AM 12 A MEANS OF ACCESSING OR CONTROLLING SOME OF THAT INNOVATIVE
09:21AM 13 TECHNOLOGY."

09:21AM 14 SO AGAIN, HE MAKES A DISTINCTION BETWEEN THE USER INTERFACE
09:21AM 15 AND THE CODE TO BE ABLE TO SAY THE COPYRIGHTED WORK AT ISSUE IS
09:21AM 16 THE USER INTERFACE. IT IS HIS TECHNICAL OPINION THAT BECAUSE
09:21AM 17 ARISTA IMPLEMENTED THAT USER INTERFACE USING DIFFERENT CODE,
09:21AM 18 DIFFERENT OPERATING SYSTEM ARCHITECTURE WITH DIFFERENT FEATURES
09:21AM 19 MAY HAVE DIFFERENT CHARACTERISTICS.

09:21AM 20 THE COURT: WELL, ISN'T THERE A DISTINCTION BETWEEN
09:21AM 21 THE ASSERTED ELEMENTS THAT YOU CLAIM WERE COPIED AND THE WORK?

09:21AM 22 MR. PAK: TRUE, YOUR HONOR.

09:22AM 23 THE COURT: SO THE ASSERTED ELEMENTS CAN COME FROM
09:22AM 24 THE USER INTERFACE OR FROM THE LARGER OPERATING SYSTEM.

09:22AM 25 AND I DO NOT THINK DOCTOR BLACK SPEAKS TO EITHER, PERHAPS

09:22AM 1 MS. ELSTEN DOES MORE DIRECTLY IN HER OPINION ON DISGORGEMENT,
09:22AM 2 BUT THIS ONE I'M NOT ACTUALLY FINDING SUPPORTIVE OF YOUR
09:22AM 3 ARGUMENT.

09:22AM 4 MR. PAK: EXCEPT, YOUR HONOR, THE NATURE OF THE
09:22AM 5 TRANSFORMATIVE ANALYSIS IS ABOUT NOT NECESSARILY THE
09:22AM 6 TRANSFORMATION OF WHAT IS BEING ASSERTED IN TERMS OF
09:22AM 7 PROTECTABLE ELEMENTS. THE TRANSFORMATIVE ARGUMENT IS WHETHER
09:22AM 8 THE COPYRIGHTED WORK HAS BEEN TRANSFORMED OR NOT.

09:22AM 9 AND SO ALTHOUGH HIS LANGUAGE --

09:22AM 10 THE COURT: THAT'S NOT WHAT HE SAYS.

09:22AM 11 MR. PAK: RIGHT, RIGHT. BUT IN TERMS OF THE LEGAL
09:22AM 12 FRAMEWORK, WHAT THE DEFENSE IS, IS HAVE I TRANSFORMED THE
09:22AM 13 COPYRIGHTED WORK IN A WAY THAT IS TRANSFORMATIVE COMPARED TO
09:22AM 14 HOW THE COPYRIGHTED WORK WAS USED BY THE COPYRIGHT ONLY.

09:22AM 15 SO ALTHOUGH I AGREE WITH YOUR HONOR THAT DOCTOR ELSTEN'S
09:22AM 16 LANGUAGE IS MUCH MORE CLEAR THAT THE COPYRIGHTED WORK AT ISSUE
09:23AM 17 IS THE CLI, DOCTOR BLACK'S OPINIONS AND THE WAY HE THINKS ABOUT
09:23AM 18 THE USER INTERFACE AS BEING DIFFERENT FROM THE CODE FOR THE
09:23AM 19 TRANSFORMATIVE ARGUMENTS ALSO SUPPORTS HIS POSITION.

09:23AM 20 NOW WHY ARE THE TWO EXPERTS FROM ARISTA SAYING THIS?
09:23AM 21 BECAUSE REALLY, CISCO HAS BEEN PRETTY CLEAR FROM THE VERY
09:23AM 22 BEGINNING OF THIS CASE. AND WE CAN SEE THAT FROM THE VERY
09:23AM 23 FIRST COMPLAINT THAT WE FILED. THE LANGUAGE I'M ABOUT TO WALK
09:23AM 24 YOU THROUGH IS ALSO CARRIED THROUGH IN THE VARIOUS AMENDED
09:23AM 25 COMPLAINTS. THIS IS ON SLIDE 7.

09:23AM 1 AT THE VERY BEGINNING OF THE COMPLAINT WE TALKED ABOUT THE
09:23AM 2 CLI AS THE USER INTERFACE BY WHICH USERS OF CISCO'S PRODUCTS
09:23AM 3 COMMUNICATE WITH THE PRODUCT. THIS IS ON PARAGRAPH 27.

09:23AM 4 PARAGRAPH 7 OF THE COMPLAINT, WE ALLEGE THAT ARISTA
09:23AM 5 DELIBERATELY AND REPEATEDLY ENGAGED IN EXTENSIVE COPYING IN
09:23AM 6 ORDER TO COMPETE UNFAIRLY WITH CISCO, AND PUBLICLY TOUTS THAT
09:23AM 7 ITS COPYING OF CISCO'S CLI MAKE ITS EASIER FOR CISCO CUSTOMERS
09:24AM 8 TO SWITCH.

09:24AM 9 AND ALSO IN THE SAME COMPLAINT, YOUR HONOR, WE IDENTIFIED
09:24AM 10 THE SAME KINDS OF BUILDING BLOCK ELEMENTS THAT WE HAVE BEEN
09:24AM 11 DISCUSSING ALL ALONG, THE COMMAND EXPRESSIONS, THE COMMAND
09:24AM 12 STRUCTURE, PROMPTS, HIERARCHY, MODES AND SO ON.

09:24AM 13 THEN ON SLIDE 8, AS THE COMPLAINT GOES ON, WE TALK ABOUT
09:24AM 14 THE UNIQUE CLI THAT ARISTA APPROPRIATED IS PROTECTED BY U.S.
09:24AM 15 COPYRIGHTS. AND THIS IS PARAGRAPH 10 OF THE COMPLAINT, OR
09:24AM 16 ACTUALLY PARAGRAPH 43 OF THE COMPLAINT.

09:24AM 17 THEN WE GO ON TO PARAGRAPH 50 TO ALLEGE THAT ARISTA HAS
09:24AM 18 SUBSTANTIALLY COPIED CISCO'S CLI AND INFRINGED CISCO'S
09:24AM 19 COPYRIGHTS IN CISCO IOS, INCLUDING THE CLI.

09:24AM 20 AND THEN WE GO ON TO TALK ABOUT THE VARIOUS COMMANDS AND
09:24AM 21 ELEMENTS THAT WERE COPIED FROM THE CISCO USER INTERFACE.

09:24AM 22 BASED ON THOSE INITIAL ALLEGATIONS, YOUR HONOR, THEN OUR
09:25AM 23 EXPERT DR. ALMEROTH PROVIDED EXPERT OPINION SUPPORTING THE
09:25AM 24 INFRINGEMENT ALLEGATIONS IN THIS CASE, AND THIS IS SLIDE NINE
09:25AM 25 WHERE HE ALSO ALLEGED THAT THE COPYRIGHTABLE EXPRESSIONS IN

09:25AM 1 CISCO'S CLI IS THE CASE BASIS FOR HIS OPINIONS.

09:25AM 2 HE TALKS ABOUT ON PARAGRAPH 135, YOUR HONOR, ON SLIDE 9 AT
09:25AM 3 THE BOTTOM LEFT-HAND CORNER, ARISTA HAS FURTHER EXPLAINED THAT
09:25AM 4 ITS USE OF CISCO'S COPYRIGHTED CLI WAS TO COMPETE DIRECTLY WITH
09:25AM 5 CISCO.

09:25AM 6 I DON'T THINK THERE COULD BE ANY CONFUSION HERE THAT WE
09:25AM 7 WERE CLAIMING THE CLI AS COPYRIGHTED. AND WE GO ON TO TALK
09:25AM 8 ABOUT THE COPYRIGHTED WORK, COPYING OF CISCO'S CLI COMMANDS,
09:25AM 9 AND FINALLY THE ALLEGATION THAT ARISTA HAS COPIED THE ENTIRE
09:25AM 10 LOOK AND FEEL OF CISCO'S IOS CLI.

09:25AM 11 SLIDE 10 HE TALKS ABOUT IN THE CONTEXT OF THE ACCESS AND
09:25AM 12 SIMILARITY, AGAIN HIS FOCUS IS ON ACCESS TO THE CLI, ACCESS TO
09:26AM 13 THE COPYING AND THEN THE COPYING HAPPENS DIRECTLY BASED ON THAT
09:26AM 14 ACCESS. AND THE DIRECT EVIDENCE OF COPYING THAT WE HAVE IN
09:26AM 15 THIS CASE.

09:26AM 16 WE HAVE INCLUDED SOME ADDITIONAL QUOTES FROM SLIDE 11 FROM
09:26AM 17 DR. ELSTEN WHERE SHE MAKES IT CLEAR THAT THE SOURCE CODE
09:26AM 18 RELATED TO THE ALLEGED INFRINGED CLI COMMANDS ARE NOT AT ISSUE
09:26AM 19 IN THIS CASE. THE COPYRIGHTS PRINCIPALLY CONCERN THE CLI.
09:26AM 20 THERE'S NO ALLEGATION THAT ARISTA HAS COPIED ANY OF CISCO CLI.

09:26AM 21 THOSE ARE VERY CLEAR STATEMENTS FROM HER. AGAIN, THOSE ARE
09:26AM 22 FUNDAMENTAL PREMISES FOR HER APPORTIONMENT OPINIONS.

09:26AM 23 SLIDE 12, DOCTOR BLACK ALSO MAKES THAT CLEAR. I HAVE BEEN
09:26AM 24 INFORMED AND UNDERSTAND THAT CISCO DOES NOT ALLEGE ANY SOURCE
09:26AM 25 CODE COPYING BY ARISTA IN THIS CASE. THE ASPECTS OF CISCO'S

09:26AM 1 CLI THAT ARE THE BASIS OF THE COPYRIGHT INFRINGEMENT CLAIM,
09:27AM 2 THERE'S NO CLAIM THAT ARISTA HAS COPIED ANY SOURCE OR OBJECT
09:27AM 3 CODE THAT IMPLEMENTS THE CISCO CLI. CISCO IS NOT ALLEGING
09:27AM 4 COPYING OF ANY CISCO SOURCE CODE.

09:27AM 5 AND THOSE ARE FROM DOCTOR BLACK'S REPORT AT PARAGRAPHS 518,
09:27AM 6 519, AND PARAGRAPH 7, AND THE FIRST ONE WAS FROM THE
09:27AM 7 SUPPLEMENTAL REBUTTAL REPORT PARAGRAPH 33. AND AGAIN, ONE MORE
09:27AM 8 QUOTE FROM DOCTOR BLACK, PARAGRAPH 52.

09:27AM 9 SO WE THINK WE HAVE BEEN VERY CLEAR IN TERMS OF
09:27AM 10 DISCLOSURES. WE THINK THEIR EXPERTS CLEARLY UNDERSTOOD WHAT
09:27AM 11 WAS AT ISSUE. AND BASED ON WHAT THEIR UNDERSTANDING WAS OF OUR
09:27AM 12 ALLEGATIONS -- AND THEY, THE EXPERTS SAY, WELL, HAS ARISTA
09:27AM 13 WORKED TOGETHER TO CREATE DEFENSES IN THIS CASE THAT ARE
09:27AM 14 PREDICATED ON TREATING THE USER INTERFACE AS BEING SEPARATE
09:27AM 15 FROM THE CODE.

09:27AM 16 SO FOR US, WE REALLY DON'T THINK ARISTA CAN HAVE IT BOTH
09:27AM 17 WAYS. IF THEY ARE GOING TO COME IN AND MAKE THE APPORTIONMENT
09:28AM 18 ARGUMENTS TO SAY THE PROFITS MADE BY SELLING THE ACCUSED
09:28AM 19 TECHNOLOGIES SHOULD BE APPORTIONED BASED ON THE FACT THAT USER
09:28AM 20 INTERFACE IS A SMALL COMPONENT FROM THEIR VIEW OF THE OVERALL
09:28AM 21 SYSTEM, AND THE FACT THAT THEY HAVE IMPLEMENTED THE USER
09:28AM 22 INTERFACE USING DIFFERENT CODE, ALLOWS THEM TO MAKE THAT
09:28AM 23 APPORTIONMENT, THEN I THINK FOR FAIR USE PURPOSE OR WHATEVER
09:28AM 24 THEY WANT TO USE THE DEFINITION OF THE WORK TO BE, THEY
09:28AM 25 SHOULDN'T BE ALLOWED TO TAKE A CONTRARY POSITION.

09:28AM 1 AND THE SAME IS TRUE WITH DOCTOR BLACK, THEY ARE MAKING A
09:28AM 2 TRANSFORMATIVE DEFENSE THAT RELIES ON USING THE USER INTERFACE
09:28AM 3 AS THE COPYRIGHTED WORK IN ORDER TO MAKE THE TRANSFORMATIVE
09:28AM 4 ARGUMENTS.

09:28AM 5 AND SO WE HAVE PROVIDED DISCOVERY RESPONSES, YOUR HONOR,
09:28AM 6 THIS IS ON SLIDE 14 WHERE WE MADE SOME OF THE SAME ALLEGATIONS.
09:28AM 7 STARTING IN MAY OF 2015 WHERE WE PROVIDED A NUMBER OF RESPONSES
09:28AM 8 TO THE INTERROGATORIES, AT THE BOTTOM IT SAYS, "ARISTA ALSO HAS
09:29AM 9 EXPLAINED THAT ITS USE OF CISCO'S COPYRIGHTED CLI WAS AN
09:29AM 10 INTENTIONAL PLOY TO WIN CUSTOMERS FROM CISCO SO ARISTA CAN
09:29AM 11 MARKET ITS PRODUCT AS AN EASILY IMPLEMENTED ALTERNATIVE TO
09:29AM 12 CISCO PRODUCTS FOR CISCO'S EXISTING CUSTOMERS."

09:29AM 13 SO COULD WE -- HAD THE DISCOVERY TURNED OUT OTHERWISE OR
09:29AM 14 THE PUBLIC FACTS HAD TURNED OUT OTHERWISE, COULD WE HAVE ALSO
09:29AM 15 ALLEGED OUR COPYRIGHT INTEREST IN THE SOURCE CODE, ABSOLUTELY.

09:29AM 16 BUT IN THIS CASE, WE HAVE BEEN VERY CONSISTENT THAT THE
09:29AM 17 PRINCIPAL OR THE PRIMARY BASIS OF THE COPYING ALLEGATIONS IN
09:29AM 18 THIS CASE INVOLVES WHAT WE HAVE BEEN CALLING THE COPYRIGHTED
09:29AM 19 CLI. AND THAT HAS BEEN THE ALLEGATION FROM DAY ONE.

09:29AM 20 THE COURT: AND THAT'S THE ENTIRE USER INTERFACE. I
09:29AM 21 JUST WANT TO MAKE THAT --

09:29AM 22 MR. PAK: THAT'S RIGHT.

09:29AM 23 THE COURT: BECAUSE -- I'VE GONE BACK AND LOOKED AT
09:29AM 24 THE COMPLAINT AND THE AMENDED COMPLAINT AS WELL, AND I MAY HAVE
09:30AM 25 MISUNDERSTOOD AT SUMMARY JUDGEMENT, YOUR TERMINOLOGY. AND THEN

09:30AM 1 IT BECAME CLEAR THAT IT -- OR I CAME TO UNDERSTAND THAT YOU
09:30AM 2 WERE USING THE TERM SYNONYMOUSLY, AND YOU ARE.

09:30AM 3 MR. PAK: YES. THANK YOU, YOUR HONOR. AND WE ARE.

09:30AM 4 AND AGAIN, I THINK THAT THE BEST PLACE IN THE COMPLAINT TO
09:30AM 5 FIND THAT IS AGAIN, PARAGRAPH 27, WHERE WE SAY CLI IS THE USER
09:30AM 6 INTERFACE BY WHICH USERS OF CISCO'S PRODUCTS COMMUNICATE WITH
09:30AM 7 THE PRODUCT IN ORDER TO CONFIGURE AND MANAGE THE PRODUCT. SO I
09:30AM 8 THINK WE PROVIDED A CLEAR DEFINITION THERE.

09:30AM 9 OF COURSE, WE DO TALK ABOUT THE DIFFERENT BUILDING BLOCKS.
09:30AM 10 AND I THINK AT THE SUMMARY JUDGEMENT STAGE, WHAT WAS BEFORE
09:30AM 11 YOUR HONOR WERE THE SPECIFIC ELEMENTS THAT HAVE BEEN IDENTIFIED
09:30AM 12 WERE COPIED.

09:30AM 13 BUT THE CLI, USER INTERFACE, THOSE WERE USED SYNONYMOUSLY
09:30AM 14 THROUGHOUT. AND THAT'S ALSO HOW THE HISTORICAL DOCUMENTS AND
09:30AM 15 THE TESTIMONY FROM THE WITNESSES HAVE TREATED THE TWO WORDS AS
09:30AM 16 WELL.

09:30AM 17 SO WITH THAT UNDERSTANDING, I DO WANT TO COVER VERY BRIEFLY
09:30AM 18 WHAT WE BELIEVE ARE THE USER INTERFACES OR THE COPYRIGHTED
09:31AM 19 WORKS AT ISSUE IN THIS CASE.

09:31AM 20 AND THIS IS ON SLIDE 17. AS YOU HAVE SEEN FROM OUR PAPERS
09:31AM 21 AND ALSO WE INCLUDED IN OUR COMPLAINT, PARAGRAPH 25, THERE ARE
09:31AM 22 FOUR RELATED YET DISTINCT OPERATING SYSTEMS THAT CISCO MAKES,
09:31AM 23 IOS, IOS XR, IOS XE, AND NX-OS.

09:31AM 24 AND WE HAVE DOCUMENTS THAT YOU WILL SEE AT TRIAL AND
09:31AM 25 TESTIMONY THAT YOU WILL SEE AT TRIAL WHERE ARISTA WILLFULLY AND

09:31AM 1 CONSCIOUSLY DECIDED TO COPY FROM ALL FOUR OF THESE OPERATING
09:31AM 2 SYSTEMS.

09:31AM 3 THE COURT: AND YOUR EXHIBIT ON PROTECTED ELEMENTS
09:31AM 4 IDENTIFIES THEM BY OPERATING SYSTEM.

09:31AM 5 MR. PAK: THAT'S RIGHT, YOUR HONOR. EXACTLY.

09:31AM 6 SO WHAT WE DID IN THE PROTECTABILITY FILING WAS ORGANIZE
09:31AM 7 THE COMMANDS, ORGANIZE THE BUILDING BLOCKS BY OPERATING SYSTEM
09:31AM 8 TYPE.

09:31AM 9 AND THAT'S NOT SOMETHING NEW IN THE CASE, WE HAVE DONE THIS
09:32AM 10 CONSISTENTLY WITH THE RESPONSES AND THE REGISTRATION FILINGS.

09:32AM 11 SLIDE 18, THIS IS PART OF DR. ALMEROOTH'S REPORT WHICH WHEN
09:32AM 12 CISCO REGISTERED THEIR COPYRIGHTS, THERE ARE 26 OF THE
09:32AM 13 REGISTRATIONS AT WORK, WE SPECIFICALLY REGISTERED A PARTICULAR
09:32AM 14 VERSION OF ONE OF THESE FOUR OPERATING SYSTEMS.

09:32AM 15 SO THE FIRST SERIES OF REGISTRATIONS YOU SEE ON THE LEFT
09:32AM 16 RELATE TO THE CISCO IOS. CITE STARTING WITH VERSION 11.0 TO
09:32AM 17 15.4. THEN WE HAVE SIMILAR REGISTRATIONS FROM IOS XR FROM 3.0
09:32AM 18 TO 5.2. AND TWO REGISTRATIONS FOR IOS XE, 2.1, 3.5. AND THEN
09:32AM 19 FOUR REGISTRATIONS FOR NX-OS WHICH IS RELEASE 4.0 TO 6.2.

09:33AM 20 AND THEN THESE ARE THE -- YOUR HONOR, THESE ARE THE BATES
09:33AM 21 NUMBERS FOR THE APPLICATIONS, THE COPYRIGHT REGISTRATION, THE
09:33AM 22 REGISTRATION NUMBERS, AND THE PUBLICATION AND REGISTRATION
09:33AM 23 DATES THAT ARE ASSOCIATED WITH THEM.

09:33AM 24 THE COURT: ARE THE ONLY ONES THAT WERE REGISTERED
09:33AM 25 MORE THAN FIVE YEARS AFTER PUBLICATION, THE EARLY ONES?

09:33AM 1 MR. PAK: I BELIEVE THOSE ARE THE EARLY ONES,
09:33AM 2 YOUR HONOR.

09:33AM 3 THE COURT: OKAY.

09:33AM 4 MR. PAK: AND THEN ON SLIDE 19, THERE WERE A SERIES
09:33AM 5 OF DISCOVERY REQUESTS FROM ARISTA ABOUT COMMAND ORIGINATION AND
09:33AM 6 COMMERCIAL USE OF THOSE COMMANDS.

09:33AM 7 AND EVERY OPPORTUNITY WE HAD, WE MADE IT VERY CLEAR THAT
09:33AM 8 FOR A PARTICULAR COMMAND THESE ARE THE PARTICULAR OPERATING
09:33AM 9 SYSTEMS OF WHICH THAT COMMAND WAS ASSOCIATED WITH.

09:33AM 10 FOR EXAMPLE, IN THE ALMEROOTH REPORT, EXHIBIT OF COPYING
09:33AM 11 TWO, WE HAVE, I WILL USE ONE EXAMPLE, AAA, AUTHENTICATION LOGIN
09:33AM 12 IS THE COMMAND. FOR THAT COMMAND, WE IDENTIFIED CISCO IOS, IOS
09:34AM 13 XR AND IOS XE, AS THE OPERATING SYSTEMS FOR WHICH THE USER
09:34AM 14 INTERFACE CONTAINS THAT COMMAND. AND WE PROVIDED THE SIMILAR
09:34AM 15 INFORMATION FOR ALL OF THE ASSERTED ELEMENTS IN THIS CASE.

09:34AM 16 AND IN CISCO'S SUPPLEMENTAL RESPONSE TO ARISTA'S
09:34AM 17 INTERROGATORY 16, YOU CAN SEE THAT WE ALSO IDENTIFIED THE FIRST
09:34AM 18 DATE WHEN A COMMAND WAS MADE PART OF A CISCO PRODUCT.

09:34AM 19 AND AGAIN, WE TREATED THAT AS LOOKING AT A PARTICULAR
09:34AM 20 OPERATING SYSTEM, ONE OF THE FOUR AT ISSUE. SO HERE IT WOULD
09:34AM 21 BE AAA AUTHENTICATION LOG IN. IT APPEARED FOR THE FIRST TIME
09:34AM 22 IN CISCO IOS.

09:34AM 23 THE COURT: IS THERE ANY ASSERTED ELEMENT THAT HAS
09:34AM 24 NOT APPEARED IN A CISCO PRODUCT?

09:34AM 25 MR. PAK: NO, NO.

09:34AM 1 SO ALL OF THE BUILDING BLOCKS, EVERYTHING YOU HAVE SEEN,
09:34AM 2 WHETHER IT'S COMMAND OUTPUTS, HELP DESCRIPTIONS, HIERARCHIES,
09:34AM 3 ALL OF THAT WAS FIRST INTRODUCED IN A CISCO PRODUCT DESCRIBED
09:34AM 4 IN USER MANUALS EMBODIED IN THE SOURCE CODE.

09:35AM 5 THE COURT: ALL RIGHT. NOW LET ME ASK YOU A LITTLE
09:35AM 6 BIT ABOUT THE WORK AS YOU DEFINE IT.

09:35AM 7 MR. PAK: YES.

09:35AM 8 THE COURT: I HAVE THE ASSERTED PROTECTABLE ELEMENTS
09:35AM 9 WHICH IS A SUBSET OF THE WORK OF THE USER INTERFACE, AND I
09:35AM 10 GATHER THAT THROUGH TRIAL THERE WILL BE SOME QUANTIFICATION OF
09:35AM 11 THE WORK AND OF THESE ALLEGED PROTECTABLE ELEMENTS. AND THEN
09:35AM 12 OF THE ULTIMATELY PROTECTABLE ELEMENTS AS I DETERMINE THEM.

09:35AM 13 AND I -- YOU HAVE THROUGHOUT THE CASE, TALKED ABOUT THE
09:35AM 14 COPYING BEING OF THE LOOK AND FEEL OF THE USER INTERFACE. BUT
09:35AM 15 I DON'T KNOW WHAT PORTION THESE PROTECTABLE ELEMENTS ARE OF THE
09:35AM 16 USER INTERFACE.

09:35AM 17 IS THAT SOMETHING I NEED TO BE CONCERNED ABOUT NOW?

09:35AM 18 MR. PAK: I DON'T THINK YOU NEED TO BE CONCERNED
09:35AM 19 ABOUT THAT NOW. BUT LET ME, YOUR HONOR, GIVE YOU A PREVIEW OF
09:35AM 20 WHAT I THINK YOU WILL HEAR FROM BOTH SIDES IN TERMS OF THE
09:36AM 21 ISSUE OF THE AMOUNT OF COPYING, BECAUSE THIS IS REALLY ABOUT
09:36AM 22 UNDER FAIR USE, YOU HAVE A QUESTION OF WHAT WAS TAKEN AS IT
09:36AM 23 RELATES TO THE COPYRIGHTED WORK.

09:36AM 24 THE COURT: YES.

09:36AM 25 MR. PAK: THE LAW, WE BELIEVE, IS VERY CLEAR THAT YOU

09:36AM 1 LOOK AT NOT ONLY THE QUANTITATIVE NUMBERS, BUT YOU LOOK AT THE
09:36AM 2 QUALITATIVE ASPECTS.

09:36AM 3 THE COURT: YES.

09:36AM 4 MR. PAK: AND SO THE QUESTION ISN'T SUCH THAT --
09:36AM 5 ISN'T JUST A SIMPLE QUANTIFICATION OF HERE'S.

09:36AM 6 THE COURT: I UNDERSTAND.

09:36AM 7 MR. PAK: X NUMBER OF COMMANDS, THESE X NUMBER OF
09:36AM 8 COMMANDS SUBSET OF WHICH WOULD HAVE BEEN COPIED INTO THE
09:36AM 9 PRODUCT.

09:36AM 10 THE COURT: AND SO THE -- THIS QUANTIFICATION, IN
09:36AM 11 COMPARISON, HAS NOTHING TO DO WHERE THE FIRST DETERMINATION BY
09:36AM 12 THE JURY OF INFRINGEMENT.

09:36AM 13 MR. PAK: THAT'S CORRECT.

09:36AM 14 THE COURT: IT IS ONLY RELEVANT, IN YOUR VIEW, TO THE
09:36AM 15 JURY'S DETERMINATION OF THE DEFENSE OF FAIR USE.

09:36AM 16 MR. PAK: THAT'S RIGHT, YOUR HONOR.

09:36AM 17 BECAUSE I DON'T -- AGAIN, I DON'T THINK THEY HAVE PRESERVED
09:36AM 18 THIS ARGUMENT, I DON'T THINK THEY HAVE COME IN AND SAID IF THE
09:36AM 19 COPYRIGHTED WORK IS THE USER INTERFACE AS OPPOSED TO ALL OF THE
09:36AM 20 CODE, I DON'T THINK THAT WE WILL HEAR AN OPINION THAT SAYS THIS
09:37AM 21 IS DE MINIMUS, THAT THE 506 COMMANDS THAT WERE COPIED AND ALL
09:37AM 22 THE DIFFERENT ASPECTS --

09:37AM 23 THE COURT: DOES THE DE MINIMUS -- AND I'M GETTING
09:37AM 24 OFF ON A TANGENT, BUT I WILL ASK YOU ANYWAY.

09:37AM 25 MR. PAK: SURE.

09:37AM 1 THE COURT: DOES A DE MINIMUS USE COME INTO PLAY ON
09:37AM 2 INFRINGEMENT SEPARATE FROM FAIR USE?

09:37AM 3 I DON'T SEE IT IN -- AND I THINK ARISTA BELIEVES IT DOES.
09:37AM 4 I DON'T SEE THAT REFLECTED ANYWHERE IN THE MODEL JURY
09:37AM 5 INSTRUCTIONS.

09:37AM 6 AND SO I'M -- I DON'T KNOW WHICH WAY THAT CUTS. IT SEEMS
09:37AM 7 LIKE IT FORESHADOWS FAIR USE BECAUSE IT SEEMS TO BE A FAIRLY
09:37AM 8 SIGNIFICANT ASPECT OF FAIR USE.

09:37AM 9 MR. PAK: I REALLY DO THINK, ULTIMATELY, IT'S A FAIR
09:37AM 10 USE QUESTION, YOUR HONOR. BECAUSE YOU COULD, FOR EXAMPLE, FROM
09:37AM 11 AN INFRINGEMENT PERSPECTIVE, WHAT WE ARE TRYING TO DO IS ASSESS
09:37AM 12 THE -- WELL, THERE ARE TWO THINGS THAT WE HAVE TO -- AND MY
09:37AM 13 PARTNER, MS. KATHLEEN SULLIVAN, WILL TALK ABOUT THIS A LITTLE
09:37AM 14 BIT MORE IN THE CONTEXT OF THE JURY INSTRUCTIONS.

09:37AM 15 BUT THE LAW UNDER COPYRIGHT LAW HAS TWO PARALLEL PATHS.
09:38AM 16 THERE IS THE DIRECT EVIDENCE OF COPYING LINE OF CASES, AND THEN
09:38AM 17 THERE IS THE LINE OF CASES THAT SAYS WHERE YOU DON'T HAVE
09:38AM 18 DIRECT EVIDENCE OF COPYING, WE LOOK AT QUESTIONS OF ACCESS AND
09:38AM 19 THEN SIMILARITY.

09:38AM 20 AND THE QUESTION IS WHETHER A SUBSTANTIALLY SIMILAR OR --

09:38AM 21 THE COURT: BUT YOU ARE ALLEGING DIRECT.

09:38AM 22 MR. PAK: WE ARE.

09:38AM 23 THE COURT: SO WE DON'T EVEN HAVE TO BE CONCERNED
09:38AM 24 WITH THE CIRCUMSTANTIAL CASE.

09:38AM 25 MR. PAK: I DON'T THINK WE DO.

09:38AM 1 I THINK IT'S A FALLBACK IN THE SENSE THAT IF THE JURY
09:38AM 2 DOESN'T BELIEVE THE EVIDENCE, SHOULD WE WILL PRESENT AND WE
09:38AM 3 THINK THERE IS SUBSTANTIAL EVIDENCE IN THIS CASE OF DIRECT
09:38AM 4 COPYING, AND WE BELIEVE THAT THE JURY SHOULD BE TOLD THAT IF
09:38AM 5 YOU FIND THERE IS DIRECT COPYING THAT YOU DON'T EVEN HAVE TO
09:38AM 6 GET TO THE QUESTION OF WHETHER THE COPYING WAS SUBSTANTIALLY
09:38AM 7 SIMILAR OR --

09:38AM 8 THE COURT: SO THAT'S A DIFFERENT SUBSTANTIALLY
09:38AM 9 SIMILAR THAN THE BROAD VERSUS -- THAN THE PROTECTION.

09:38AM 10 MR. PAK: YES.

09:38AM 11 THE COURT: BECAUSE IT --

09:38AM 12 MR. PAK: IT IS, YES.

09:38AM 13 THE COURT: IT'S DIFFICULT WHEN THE SAME TERM OF ART
09:39AM 14 IS USED SO DIFFERENTLY IN SUCH DIFFERENTLY -- IN SUCH DIFFERENT
09:39AM 15 SETTINGS. AND WE WILL TALK ABOUT THAT WITH JURY INSTRUCTIONS.
09:39AM 16 BUT IF I HAD TROUBLE WITH IT, AND THE I COULD SPEND TIME TRYING
09:39AM 17 TO FIGURE IT OUT AND I GET TO TALK TO YOU, I DON'T KNOW HOW THE
09:39AM 18 JURY IS GOING TO DEAL WITH THAT.

09:39AM 19 SO I THINK IN THE JURY INSTRUCTIONS THERE MIGHT HAVE BEEN
09:39AM 20 SOME DISCUSSION OF DIFFERENT TERMINOLOGY THAT WOULD BE MORE APT
09:39AM 21 FOR THIS ISSUE OF YOUR PROOF OF COPYING, BECAUSE OF COURSE THE
09:39AM 22 JURY IS GOING TO WALK THROUGH COPYING AND THEN INFRINGEMENT
09:39AM 23 SEPARATELY.

09:39AM 24 MR. PAK: BUT I THINK THE BOTTOM LINE IS WHETHER YOU
09:39AM 25 LOOK AT IT AS JUST FAIR USE OR EVEN IF YOU WERE TO SAY THAT

09:39AM 1 IT'S A QUESTION RELATED TO INFRINGEMENT AS PART OF SOME TYPE OF
09:39AM 2 DE MINIMUS DEFENSE, YOUR HONOR, I THINK IT COMES BACK TO THE
09:39AM 3 SAME POINT. WHICH IS FROM A COPYRIGHT PERSPECTIVE, WE ARE NOT
09:39AM 4 ASKING THE JURY OURS JUST SIMPLY COUNT UP THINGS.

09:39AM 5 WHAT WE ARE ASKING THEM TO DO IS GOING OUT AND THERE ARE
09:39AM 6 LOTS OF CASES WE CITED TO YOU YOUR HONOR, IS THIS THE HEART OF
09:40AM 7 A COPYRIGHTED WORK, IS WHAT THEY TOOK IMPORTANT, IS WHAT THEY
09:40AM 8 TOOK SOMETHING --

09:40AM 9 THE COURT: THAT'S IN A FAIR USE CONSIDERATION.

09:40AM 10 MR. PAK: FAIR USE. AND ALSO FROM A DE MINIMUS
09:40AM 11 PERSPECTIVE, WHEN YOU TALK ABOUT --

09:40AM 12 THE COURT: AGAIN, YOU SAY THERE'S NO DE MINIMUS
09:40AM 13 ASPECT.

09:40AM 14 MR. PAK: RIGHT.

09:40AM 15 THE COURT: WHICH WOULD BE REALLY TO NEGATE YOUR
09:40AM 16 CASE.

09:40AM 17 DE MINIMUS USE IS NOT AN AFFIRMATIVE DEFENSE. SO IT WOULD,
09:40AM 18 IF ANYTHING, BE AN OPPORTUNITY FOR THE DEFENSE TO NEGATE AN
09:40AM 19 ELEMENT OF YOUR CASE.

09:40AM 20 MR. PAK: I BELIEVE THAT'S CORRECT.

09:40AM 21 WITH RESPECT TO -- I BELIEVE THAT'S CORRECT, ALTHOUGH AS
09:40AM 22 YOUR HONOR NOTES, I THINK THERE'S AMBIGUITY IN THE MODEL
09:40AM 23 INSTRUCTIONS.

09:40AM 24 I THINK THAT FROM OUR PERSPECTIVE, THIS IS A CASE REALLY
09:40AM 25 ABOUT THE, FROM OUR PERSPECTIVE, COPYING OF VERY IMPORTANT

09:40AM 1 COMMANDS, VERY IMPORTANT ELEMENTS.

09:40AM 2 WE HAVE LOTS OF EVIDENCE THAT WE WILL SHOW TO THE JURY AT
09:40AM 3 TRIAL THAT TALK ABOUT ARISTA COPYING THE THINGS THAT THEY
09:40AM 4 THOUGHT WERE THE MOST RELEVANT, THE MOST IMPORTANT.

09:41AM 5 AND THIS DOES GO INTO ONE OF THE ISSUES IN THE CASE THAT
09:41AM 6 YOU HAVE HEARD US TALK ABOUT WHICH IS, FOR EXAMPLE, IOS IS AN
09:41AM 7 UBER OPERATING SYSTEM.

09:41AM 8 WE MAKE LOTS AND LOTS OF PRODUCTS THAT ARISTA DOES NOT
09:41AM 9 MAKE. IT'S AN OPERATING SYSTEM THAT CONTROLS CABLE DEVICES,
09:41AM 10 IT'S AN OPERATING SYSTEM THAT CONTROLS VOICEOVER IP GATEWAYS
09:41AM 11 AND HOME NETWORKING PRODUCTS, THE KINDS OF PRODUCTS THAT ARISTA
09:41AM 12 DOES NOT MAKE.

09:41AM 13 SO FROM OUR PERSPECTIVE, WHETHER YOU LOOK AT IT AS FAIR USE
09:41AM 14 OR YOU LOOK AT IT AS DE MINIMUS, WE THINK IT'S CRITICALLY
09:41AM 15 IMPORTANT THAT ARISTA COPIED THOSE ELEMENTS FROM OUR INTERFACE
09:41AM 16 THAT PERTAIN DIRECTLY TO THE GIGABIT ETHERNET SWITCHES THAT
09:41AM 17 THEY MAKE.

09:41AM 18 THE COURT: WELL THERE WAS A POINT IN READING YOUR
09:41AM 19 PAPERS WHERE I BECAME CONCERNED THAT YOU WERE FURTHER
09:41AM 20 SEGMENTING THE WORK TO BE ONLY THE PORTION OF THE USER
09:41AM 21 INTERFACE THAT SUPPORTED THE SWITCH IN QUESTION, AND THAT'S NOT
09:41AM 22 WHAT YOU ARE DOING?

09:41AM 23 MR. PAK: THAT'S NOT WHAT WE ARE DOING.

09:41AM 24 WE ARE MERELY JUST GIVING YOU A FLAVOR OF THE TYPE OF
09:42AM 25 EVIDENCE THAT WE WILL BE PRESENTING AT TRIAL AS TO THE

09:42AM 1 QUALITATIVE SIGNIFICANCE OF WHAT THEY TOOK. THAT THE
09:42AM 2 COPYRIGHTED WORK, THE USER INTERFACE THAT CORRESPONDS TO EACH
09:42AM 3 OF THESE FOUR OPERATING SYSTEMS. WE BELIEVE THAT WHAT THEY
09:42AM 4 TOOK FROM EACH OF THESE FOUR OPERATING SYSTEMS ARE THE MOST
09:42AM 5 IMPORTANT COMMANDS, USER INTERFACE ELEMENTS, FOR THEIR USE IN
09:42AM 6 THE GIGABIT ETHERNET SWITCHING CONTEXT, BECAUSE THAT'S THE TYPE
09:42AM 7 OF PRODUCT THAT THEY MAKE.

09:42AM 8 SO IT DOESN'T MAKE SENSE FOR ARISTA TO COPY COMMANDS THAT
09:42AM 9 HAVE NOTHING TO DO WITH ETHERNET. SO FROM OUR PERSPECTIVE, FOR
09:42AM 10 THEM TO COME IN AND SAY WELL, THERE ARE 10,000 PLUS COMMANDS IN
09:42AM 11 IOS, WHO CARES, YOU KNOW, FROM OUR PERSPECTIVE.

09:42AM 12 THE COURT: THAT WOULD BE UP TO THE JURY.

09:42AM 13 MR. PAK: THAT WOULD BE UP TO THE JURY.

09:42AM 14 SO THAT'S REALLY -- AND THEN AT THE END, YOUR HONOR, WE
09:42AM 15 JUST HAD A SHORT TIMELINE FOR YOUR HONOR'S BENEFIT THAT SHOWS
09:42AM 16 THE DISCLOSURE DATES FOR VARIOUS MATERIALS THAT I HAVE
09:42AM 17 PRESENTED TO YOU TODAY.

09:42AM 18 THE COURT: THANK YOU.

09:42AM 19 MR. PAK: THANK YOU, YOUR HONOR.

09:42AM 20 THE COURT: ALL RIGHT. LET ME TURN TO MR. KWUN, ARE
09:43AM 21 YOU ARGUING THIS?

09:43AM 22 MR. FERRALL: I'M GOING TO START, TO TALK ABOUT THE
09:43AM 23 DISCLOSURES, IF THAT'S OKAY WITH YOUR HONOR.

09:43AM 24 THE COURT: ABSOLUTELY.

09:43AM 25 MR. FERRALL: SO I HAVE A SET OF SLIDES ALSO,

09:43AM 1 YOUR HONOR.

09:43AM 2 THE COURT: SO PRESUMABLY, THIS IS -- THIS GOES TO
09:43AM 3 MORE THAN JUST --

09:43AM 4 MR. FERRAL: IT DOES, INDEED.

09:43AM 5 THE COURT: OTHERWISE WE WILL BE EATING TURKEY
09:43AM 6 TOGETHER.

09:43AM 7 MR. FERRALL: NO, NO, NO.

09:43AM 8 YOUR HONOR, I THINK A COMMENT THAT YOU HAD AT THE BEGINNING
09:43AM 9 OF MR. PAK'S ARGUMENT IS AN IMPORTANT PLACE TO START, WHICH IS
09:43AM 10 TO CLARIFY WHAT WE ARE NOT FIGHTING ABOUT RIGHT NOW.

09:44AM 11 WE ARE NOT FIGHTING ABOUT THE FACT THAT CISCO HAS
09:44AM 12 REGISTERED 26 DIFFERENT OPERATING SYSTEMS. WE ARE NOT FIGHTING
09:44AM 13 ABOUT THE FACT THAT TO THE EXTENT THERE'S PROTECTED EXPRESSION
09:44AM 14 IN THOSE OPERATING SYSTEMS, THOSE ARE REGISTERED, INCLUDING
09:44AM 15 PROTECTED EXPRESSION IN THE USER INTERFACE, THOSE ARE COVERED
09:44AM 16 BY THE REGISTRATION. THAT'S NOT WHAT THIS IS ABOUT.

09:44AM 17 THE SECOND IMPORTANT POINT, WHICH MAY HAVE BEEN-- BUT WAS
09:44AM 18 NOT THE SUBJECT, LET'S SAY, OF MR. PAK'S TESTIMONY, IS THAT
09:44AM 19 THIS IS NOT A DISPUTE ABOUT WHETHER CISCO HAS ALLEGED COPYING
09:44AM 20 OF ELEMENTS OF THE USER INTERFACE.

09:44AM 21 OF COURSE, WE KNOW THAT. THAT HAS BEEN ALLEGED FROM THE
09:44AM 22 BEGINNING. SO ALL OF THE CITATIONS TO EXPERT REPORTS AND
09:44AM 23 DISCOVERY THAT ALLEGES COPYING OF CLI ELEMENTS, ABSOLUTELY. WE
09:44AM 24 KNOW THAT THAT'S THE CASE.

09:45AM 25 WHAT THIS IS ABOUT IS DEFINING THE WORK TO WHICH THE

09:45AM 1 COPYING IS GOING TO BE COMPARED. AND WE KNOW THAT'S IMPORTANT
09:45AM 2 FOR TWO, AT LEAST -- ACTUALLY, AT LEAST THREE CRITICAL ASPECTS
09:45AM 3 OF THE CASE.

09:45AM 4 ONE IS INFRINGEMENT, SINCE ULTIMATELY THE JURY NEEDS TO
09:45AM 5 DETERMINE WHETHER WHATEVER IS DETERMINED TO HAVE BEEN COPIED
09:45AM 6 PROTECTED EXPRESSION IS SUBSTANTIALLY SIMILAR OR VIRTUALLY
09:45AM 7 IDENTICAL TO THE WORK, TO THE WORK. YOU'VE GOT TO KNOW WHAT
09:45AM 8 THE DENOMINATOR IS BEFORE YOU COMPARE IT TO THE ENUMERATOR.

09:45AM 9 THE COURT: WE HAVE A VAST DIFFERENCE OF VIEW OF THAT
09:45AM 10 TERMINOLOGY RIGHT THERE THAT WE ARE GOING TO HAVE TO TALK ABOUT
09:45AM 11 IN JURY INSTRUCTIONS.

09:45AM 12 MR. FERRALL: RIGHT, RIGHT. BUT I DON'T THINK
09:45AM 13 THERE'S ANY QUESTION THAT THE LAW REQUIRES THAT COMPARISON.

09:45AM 14 THE COURT: THERE'S SOME COMPARISON THAT NEEDS TO BE
09:45AM 15 DONE, THAT'S CERTAINLY TRUE.

09:45AM 16 MR. FERRALL: RIGHT.

09:45AM 17 IT'S ALSO CRITICAL TO FAIR USE BECAUSE THE STATUTORY
09:46AM 18 ELEMENTS ALONE OF FAIR USE REFER TO THE USE IN THE CONTEXT OF
09:46AM 19 THE WORK. WHAT IS THE NATURE OF THE WORK, AND HOW HAS THE
09:46AM 20 ALLEGED INFRINGEMENT CAUSED A MARKET HARM TO THE WORK.

09:46AM 21 AGAIN, YOU'VE GOT TO KNOW THE DENOMINATOR.

09:46AM 22 LASTLY, FOR DAMAGES, AND HERE I WILL BEGIN TO ADDRESS SOME
09:46AM 23 OF MR. PAK'S POINT AND THEN WE WILL GET TO MY OWN PRESENTATION.
09:46AM 24 THIS CASE, THE DAMAGES CASE THAT WE WILL HEAR IS ALL ABOUT
09:46AM 25 DAMAGES TO LOST SALES OF CISCO'S SWITCHES WHICH RUN ENTIRE

09:46AM 1 OPERATING SYSTEMS.

09:46AM 2 THERE'S NO DAMAGES THEORY THAT SAYS THIS IS ABOUT THE LOST
09:46AM 3 VALUE TO A USER INTERFACE, NOT ONE. NEITHER SIDE TALKS ABOUT
09:46AM 4 THE LOST VALUE TO A USER INTERFACE. THEY TALK ABOUT PROFITS
09:47AM 5 EITHER THAT CISCO LOST OR THAT ARISTA GAINED AS A RESULT OF
09:47AM 6 SELLING ENTIRE SWITCHES RUNNING ENTIRE OPERATING SYSTEMS.

09:47AM 7 SO WE KNOW THAT THIS IS A CRITICAL ISSUE, WHICH IS WHY WE
09:47AM 8 BROUGHT THE MOTION IN LIMINE AND YOUR HONOR DEFERRED IT. AND
09:47AM 9 IF WE COULD JUST GO TO THE FIRST SLIDE.

09:47AM 10 YOUR HONOR, I THINK YOU WERE PROBABLY -- PROBABLY HAD THIS
09:47AM 11 IN MIND THIS MORNING, SAID THAT THIS IS CISCO'S BURDEN TO
09:47AM 12 DEMONSTRATE THAT THE DISCLOSURE HAS BEEN ADEQUATE.

09:47AM 13 SO WE KNEW THIS WAS IMPORTANT FROM THE VERY BEGINNING, WE
09:47AM 14 ASKED A SERIES OF INTERROGATORIES THAT I'M GOING TO WALK YOU
09:47AM 15 THROUGH, AND I BEG THE COURT'S PATIENCE WITH THIS BECAUSE IT
09:47AM 16 WILL TAKE A LITTLE BIT OF TIME, BUT I WILL SAY THAT NOT ONE OF
09:47AM 17 THESE WAS DISCUSSED BY MR. PAK.

09:47AM 18 SO WE ASKED FOR THIS INFORMATION ON AT LEAST FOUR DIFFERENT
09:47AM 19 OCCASIONS. THE FIRST ONE WAS PROPOUNDED IN APRIL OF 2015,
09:48AM 20 INTERROGATORY 6. IDENTIFY WITH SPECIFICITY EACH COPYRIGHTED
09:48AM 21 WORK BY COPYRIGHT AND REGISTRATION NUMBER THAT YOU CONTEND
09:48AM 22 ARISTA HAS UNLAWFULLY COPIED.

09:48AM 23 OKAY. CISCO HAS ANSWERED THIS QUESTION, THIS INTERROGATORY
09:48AM 24 MULTIPLE TIMES. I WILL SHOW YOU THE FIRST ANSWER, WHICH IS THE
09:48AM 25 NEXT SLIDE. BUT THIS IS REPEATED UP THROUGH THE VERY LAST DAY

09:48AM 1 OF DISCOVERY, THEY HAD THE SAME ANSWER.

09:48AM 2 CISCO'S ANSWER WAS TO IDENTIFY BY COLUMN, THAT COLUMN, A
09:48AM 3 LIST OF COPYRIGHTED WORKS INFRINGED BY ARISTA WHICH WERE ENTIRE
09:48AM 4 OPERATING SYSTEMS. OKAY. NO MENTION OF USER INTERFACE, NO
09:48AM 5 MENTION THAT THE WORK IS THE CLI.

09:48AM 6 IN THE SAME SET OF INTERROGATORIES, WE ASKED, IDENTIFY WITH
09:48AM 7 SPECIFICITY EACH ARISTA CLI COMMAND THAT YOU CONTEND INFRINGES
09:49AM 8 ANY COPYRIGHTED WORK, AND IDENTIFY WHICH WORK IT INFRINGES.
09:49AM 9 BECAUSE WE NEED TO TRY TO PAIR THINGS UP, WHICH ONE GOES WITH
09:49AM 10 WHICH.

09:49AM 11 SO AGAIN, WE GOT A RESPONSE WHICH REFERS US TO EACH
09:49AM 12 OPERATING SYSTEM. IOS 11.0, 11.1, ET CETERA. I DON'T HAVE THE
09:49AM 13 WHOLE CHART HERE, BUT EVERY REGISTERED OPERATING SYSTEM, THAT'S
09:49AM 14 WHAT CISCO DISCLOSED AS THE WORK IN WHICH ONE COULD FIND, THE
09:49AM 15 WORK THAT WAS INFRINGED BY THE USE OF COMMANDS.

09:49AM 16 THE COURT: WELL, THE REGISTERED WORK IS THE IOS.

09:49AM 17 SO, YOU KNOW, YOU DON'T AGREE WITH MR. PAK'S ARGUMENT THAT
09:49AM 18 THE CASE LAW GRANTED FROM OTHER DISTRICTS TALKS ABOUT WITHIN
09:49AM 19 EACH REGISTRATION THERE ARE TWO DISTINCT, PROTECTABLE WORKS,
09:50AM 20 THE SOURCE CODE AND THE USER INTERFACE. AND SO TO IDENTIFY THE
09:50AM 21 REGISTERED WORK AS THE IOS, THERE IS NO PHYSICAL REGISTERED
09:50AM 22 WORK OF THE USER INTERFACE, THIS IS MAYBE A JUDGE-CREATED
09:50AM 23 CONSTRUCT TO MAKE SENSE OF THE -- AND I THINK IT'S SUPPORTED,
09:50AM 24 AT LEAST CISCO GIVES ME SOME SUPPORT FOR THE COPYRIGHT OFFICE
09:50AM 25 ALSO SEEING THIS AS SEPARATE PROTECTED WORKS. I'M JUST NOT

09:50AM 1 SURE THAT WHEN IT SAYS REGISTERED WORK, THAT WE ARE GETTING AT
09:50AM 2 THE ISSUE I HAVE TO DECIDE WHICH IS THE ASSERTED WORK WHICH I
09:50AM 3 THINK MAY BE DIFFERENT AS A SUBSET.

09:50AM 4 MR. FERRALL: WELL, FAIR ENOUGH. ALTHOUGH THE
09:50AM 5 PREVIOUS ANSWER TO INTERROGATORY 6 --

09:50AM 6 THE COURT: WELL, THE PREVIOUS ONE MIGHT HAVE BEEN A
09:50AM 7 LITTLE CLOSER, BUT THIS ONE SAYS REGISTERED WORK. THE PREVIOUS
09:50AM 8 ONE SAYS COPYRIGHTED WORK.

09:50AM 9 MR. FERRALL: RIGHT.

09:50AM 10 AND I DON'T THINK CISCO IS GOING TO DENY THAT IT WANTS TO
09:51AM 11 PRESENT TO THE JURY THE ARGUMENT THAT THE COPYRIGHTED WORK TO
09:51AM 12 WHICH THEY COMPARE THE ALLEGED COPYING IS THE USER INTERFACE.

09:51AM 13 THE COURT: OH, THAT'S WHAT WANTS TO DO.

09:51AM 14 MR. FERRALL: ABSOLUTELY.

09:51AM 15 AND SURELY, WE DO HAVE A DISPUTE ABOUT THE LAW AND WHETHER
09:51AM 16 IT'S EVEN POSSIBLE, BUT SURELY IF CISCO WANTED THAT TO BE THE
09:51AM 17 THEORY IN THE CASE WHEN WE ASKED WHAT THE COPYRIGHTED WORK WAS,
09:51AM 18 IT SHOULD HAVE SAID THE USER INTERFACE OF IOS 11.0. AND THE
09:51AM 19 USER INTERFACE OF ALL OF THESE OTHER OPERATING SYSTEMS.

09:51AM 20 BUT LET'S CONTINUE BECAUSE THERE'S MORE.

09:51AM 21 THE COURT: OKAY.

09:51AM 22 MR. FERRALL: LET'S GO ON TO -- SO LATER IN THE CASE,
09:51AM 23 IN MARCH OF 2016, AS WE LEARNED MORE ABOUT THE ALLEGATIONS, WE
09:51AM 24 CAME TO REALIZE, OF COURSE THAT THERE LIST OF, FOR EXAMPLE 500
09:51AM 25 COMMANDS, AND HIERARCHIES AND SO FORTH, IS NOT FOUND IN ANY

09:51AM 1 OPERATING SYSTEM. THEY ARE COMBINED. IT'S A COMBINED LIST
09:52AM 2 FROM VARIOUS OF THE 26 REGISTERED WORKS. SO WE SAID WE NEED TO
09:52AM 3 GET CLARITY ON THIS.

09:52AM 4 SO WE ASKED FOR EACH COMMAND, MODE, HIERARCHY, PROMPT OR
09:52AM 5 COMMAND RESPONSE THAT YOU CONTEND ARISTA UNLAWFULLY COPIED,
09:52AM 6 IDENTIFY EACH AND EVERY ASSERTED COPYRIGHTED REGISTERED WORK IN
09:52AM 7 WHICH SUCH COMMAND APPEARS, INCLUDING THE REGISTRATION NUMBER,
09:52AM 8 ET CETERA, AND THE BATES NUMBER.

09:52AM 9 OKAY. SO THE RESPONSE, AGAIN, IS A LIST OF OPERATING
09:52AM 10 SYSTEMS.

09:52AM 11 THEN IN THE SAME SET OF INTERROGATORIES, THE NEXT
09:52AM 12 INTERROGATORY, AND THIS GETS TO YOUR QUESTION EARLIER, WHICH IS
09:52AM 13 THE QUESTION OF WHAT PORTION OF THE WORK IS ALLEGEDLY COPIED.

09:52AM 14 AND WHILE WE CAN HAVE A DISPUTE, AND MR. PAK AND CISCO CAN
09:52AM 15 ARGUE TO THE JURY THAT IT SHOULD ALL BE QUALITATIVE, THERE'S
09:53AM 16 CERTAINLY NO LAW THAT SAYS IT CAN ONLY BE QUALITATIVE AND
09:53AM 17 QUANTITATIVE DOESN'T MATTER.

09:53AM 18 SO WE ASKED INTERROGATORY 25. FOR EACH
09:53AM 19 COPYRIGHT-REGISTERED WORK THAT CISCO ALLEGES ARISTA UNLAWFULLY
09:53AM 20 COPIED, IDENTIFY THE TOTAL NUMBER OF COMMANDS MODES
09:53AM 21 HIERARCHIES, PROMPTS, RESPONSES AND LINES OF SOFTWARE CODE IN
09:53AM 22 THE WORK.

09:53AM 23 THE RESPONSE, AGAIN, IS A LIST OF OPERATING SYSTEMS ONLY,
09:53AM 24 NEVER A MENTION OF THE USER INTERFACE, NEVER A MENTION OF --
09:53AM 25 THERE'S, FRANKLY, NOT EVEN A LIST OF THE NUMBER OF COMMANDS.

09:53AM 1 WE ARE TOLD TO REFER TO SOURCE CODE AND DOCUMENTS.

09:53AM 2 THE COURT: WELL, WAIT A MINUTE, YOU ASKED FOR SOURCE
09:53AM 3 CODE, SO IT HAD TO BE PROVIDED, IT DOESN'T MEAN IT'S ASSERTED
09:53AM 4 IN THIS CASE.

09:53AM 5 MR. FERRALL: CORRECT.

09:53AM 6 BUT THE QUESTION, THE INTERROGATORY ASKED FOR THE LINES OF
09:53AM 7 CODE OF THE ASSERTED WORK. AND WHAT THEY DID WAS THEY REFERRED
09:54AM 8 US TO THE ENTIRE SOURCE CODE. THAT'S FINE. THAT WOULD -- THAT
09:54AM 9 CAN ONLY LEAD US TO CONCLUDE THAT IT'S THE ENTIRE SOURCE CODE
09:54AM 10 THAT REPRESENTS THE LINES OF THE ASSERTED WORK, RIGHT.

09:54AM 11 IF THE QUESTION IS, WHAT ARE THE -- WHAT'S THE PORTION OF
09:54AM 12 THE CODE THAT IMPLEMENTS THE CLI OR THE USER INTERFACE, THIS
09:54AM 13 WAS THE TIME FOR THEM TO ANSWER THAT QUESTION, BUT THEY DIDN'T.

09:54AM 14 LET ME TALK TO YOU A LITTLE BIT --

09:54AM 15 THE COURT: SO WHEN I LOOK AT THIS RESPONSE, OF
09:54AM 16 COURSE THIS ACTUALLY DOESN'T MEAN ANYTHING TO ME, I MEAN, THIS
09:54AM 17 IS, THIS IS INCOMPREHENSIBLE TO ME, SO I JUST WANT TO
09:54AM 18 UNDERSTAND WHAT YOU'RE SAYING.

09:54AM 19 THAT BASED ON THIS INTERROGATORY NUMBER 25 WHERE YOU ASKED
09:54AM 20 FOR EACH WORK COPIED, IDENTIFY THE TOTAL COMMANDS, ET CETERA
09:55AM 21 AND LINES OF SOFTWARE CODE IN THE WORK. AND YOU ARE SAYING
09:55AM 22 THEY IDENTIFIED THE ENTIRE IOS AND NOT JUST THE CODE THAT
09:55AM 23 CORRESPONDED TO THE USER INTERFACE?

09:55AM 24 MR. FERRALL: YES. AND I WANT TO TALK ABOUT THE
09:55AM 25 DOCUMENTS THEY IDENTIFIED ALSO.

09:55AM 1 SO THEY -- SO FOR THE CODE, THEY IDENTIFIED JUST ALL OF THE
09:55AM 2 SOURCE CODE THEY PRODUCED. FOR THE RELATED DOCUMENTS,
09:55AM 3 YOUR HONOR, THIS CITATION TO CSI, CLI, OBVIOUSLY THAT'S RATHER
09:55AM 4 OBTUSE.

09:55AM 5 THE COURT: FOR ME IT IS.

09:55AM 6 MR. FERRALL: LET ME TELL YOU WHAT IT IS.

09:55AM 7 FOR 11.0, IT'S A REFERENCE TO A LINK IN CISCO. THAT LINK
09:55AM 8 CITES TO, IN THE CASE OF 11.0, IT CITES TO ABOUT A DOZEN, MAYBE
09:55AM 9 20 DIFFERENT MANUALS COVERING EVERYTHING THAT 11.0 COVERS.

09:56AM 10 NOW THAT'S WHAT THEY DO FOR EVERY OPERATING SYSTEM. BY THE
09:56AM 11 TIME YOU GET TO SOME OF THESE LATER OPERATING SYSTEMS, THERE
09:56AM 12 ARE, JUST TO LIST THE TITLES OF THE MANUALS TAKES MULTIPLE
09:56AM 13 PAGES SINGLE SPACED. IT'S A SUMMARY EXHIBIT. I CAN HAND YOU
09:56AM 14 UP.

09:56AM 15 THE COURT: NO.

09:56AM 16 MR. FERRALL: IT IS ABOUT A 30-SOME PAGE
09:56AM 17 SINGLE-SPACED LIST OF MANUALS.

09:56AM 18 IF YOU INCLUDE EVERY DOCUMENTATION THAT HAS BEEN CITED IN
09:56AM 19 RESPONSE TO THESE INTERROGATORIES THAT HAS ASKED FOR AN
09:56AM 20 EXPLANATION OF WHAT'S THE WORK, IT'S A 30-PLUS SINGLE-SPACED
09:56AM 21 LIST OF MANUALS COVERING EVERYTHING THAT CISCO DOES. CABLE
09:56AM 22 MODEMS, HOME WIFI, PROTOCOLS THAT HAVE BEEN OUT OF DATE FOR
09:56AM 23 YEARS.

09:56AM 24 IT'S ALL CITED, IT'S ALL OUT THERE. THAT'S WHAT CISCO
09:56AM 25 ALLEGED WE ARE SUPPOSED TO COMPARE THE ASSERTION AGAINST.

09:57AM 1 THAT'S WHAT THEY'VE ALLEGED.

09:57AM 2 THE COURT: CISCO IS JUST GIVING YOU WHAT THEY THINK
09:57AM 3 IS RESPONSIVE TO WHAT YOU'VE ASKED, AND THAT CAN BE QUITE
09:57AM 4 DIFFERENT THAN WHAT THEY ARE GOING TO LATER ASSERT.

09:57AM 5 MR. FERRALL: WELL, BUT YOUR HONOR, HERE'S THE
09:57AM 6 PROBLEM, THE PRACTICAL PROBLEM THAT WE FACE -- AND I'VE GOT ONE
09:57AM 7 MORE DISCOVERY RESPONSE TO TALK ABOUT -- THE PRACTICAL PROBLEM
09:57AM 8 THAT WE FACE IS THAT BECAUSE THERE'S NOT AN ASSERTION HERE IN
09:57AM 9 RESPONSE TO FOUR DIFFERENT INTERROGATORIES, THAT THE WORK TO BE
09:57AM 10 COMPARED IS THE USER INTERFACE. THERE WAS NEVER DISCOVERY
09:57AM 11 TAKEN ABOUT THE METES AND BOUNDS OF THAT USER INTERFACE. WHAT
09:57AM 12 DOES CONSTITUTE THAT USER INTERFACE.

09:57AM 13 WE SAW AFTER SUMMARY JUDGEMENT, LONG AFTER DISCOVERY
09:57AM 14 CLOSED, CISCO'S THEORY OF THE FOUR BUILDING BLOCKS, BUT WE
09:58AM 15 NEVER HAD THE CHANCE TO -- THE DISCLOSURE OF 4 OR 5 BUILDING
09:58AM 16 BLOCKS, WHAT CONSTITUTES THOSE BUILDING BLOCKS?

09:58AM 17 THERE'S NEVER BEEN A QUANTIFICATION OF THE COMMANDS IN EACH
09:58AM 18 USER INTERFACE. THERE'S NEVER BEEN A QUANTIFICATION OF THE
09:58AM 19 MARKET HARM ON THE USER INTERFACES. YOU WON'T SEE THAT IN ANY
09:58AM 20 OF THE EXPERT REPORTS, YOU WON'T SEE ANY ANALYSIS OF THIS USER
09:58AM 21 INTERFACE HAS THIS SORT OF MARKET VALUE.

09:58AM 22 THE COURT: I GUESS, MR. FERRALL, I THINK YOUR
09:58AM 23 ARGUMENT GOES TOO FAR.

09:58AM 24 IN MY VIEW, WHAT YOU ARE SUGGESTING WOULD ESSENTIALLY
09:58AM 25 ELIMINATE THE OPPORTUNITY TO PROTECT COMPUTER SOFTWARE PROGRAMS

09:58AM 1 BECAUSE OF THE ENORMITY OF THE WORK ITSELF. AND THE DROP IN
09:58AM 2 THE OCEAN THAT THE COPYING WOULD BE, THAT FAIR USE WILL ALWAYS
09:58AM 3 RULE THE DAY SIMPLY ON THE QUANTITATIVE EVALUATION. AND IF
09:58AM 4 THERE'S A DE MINIMUS EVALUATION ON INFRINGEMENT, A COPYRIGHT
09:59AM 5 OWNER COULD NEVER WIN.

09:59AM 6 I THINK YOU ARE SAYING TOO MUCH HERE. AND I THINK IT IS
09:59AM 7 REASONABLE, AND FRANKLY I DON'T ACTUALLY THINK THAT CISCO HAS
09:59AM 8 NARROWED THE SCOPE OF ITS WORK AS MUCH AS I HAD FEARED IT WAS
09:59AM 9 DOING EARLIER. THE USER INTERFACE IS STILL A SUBSTANTIAL WORK.

09:59AM 10 AND THESE -- AND I HAVE -- I MEAN, I HAVE TO SIT AT THE
09:59AM 11 TRIAL TO FIND OUT WHAT IT IS BECAUSE IT DOESN'T MATTER TO ME
09:59AM 12 NOW HOW BIG IT IS. BUT I ONLY BECAME CONCERNED WHEN I THOUGHT
09:59AM 13 THAT THEY WERE DEFINING THE WORK AS EXACTLY WHAT WAS COPIED.
09:59AM 14 AND I WAS WRONG ON THAT.

09:59AM 15 AND THEN I BECAME CONCERNED THROUGH SOME OF THE PHRASEOLOGY
09:59AM 16 THAT THEY WERE DEFINING THE WORK AS THAT PORTION OF THE USER
09:59AM 17 INTERFACE THAT SUPPORTED THE PARTICULAR PRODUCTS IN QUESTION.
09:59AM 18 AND THAT'S NOT WHAT THEY ARE DOING.

09:59AM 19 SO THERE CLEARLY WERE WAYS THAT THEY COULD HAVE MAYBE
10:00AM 20 MANIPULATED THE DEFINITION OF THE WORK THAT WOULD HAVE BEEN
10:00AM 21 OUTSIDE THE BOUNDS OF ANY CASE AUTHORITY.

10:00AM 22 BUT HERE, THIS IS -- SEEMS LIKE A PRETTY STRAIGHTFORWARD
10:00AM 23 DIVIDE, A COMPLAINT THAT ACTUALLY SEEMS TO IDENTIFY IT. I HAVE
10:00AM 24 SOME CONCERNS ABOUT YOUR COMMENTS ON DAMAGES THAT I WILL ASK
10:00AM 25 MR. PAK TO ADDRESS WHEN IT'S HIS TURN.

10:00AM 1 BUT, YOU KNOW, I GUESS I'M JUST NOT SEEING IT. YOU KNOW,
10:00AM 2 I'M A LITTLE -- I AM CONCERNED WHEN YOU TALK ABOUT THERE NOT
10:00AM 3 BEING DISCOVERY TO DETERMINE, AS YOU WILL, THE METES AND BOUNDS
10:00AM 4 OF THE USER INTERFACE. BUT I DON'T THINK HE'S PUTTING METES OR
10:00AM 5 BOUNDS ON IT, I'M NOT SURE THERE IS ANY DISCOVERY WHEN IT IS
10:00AM 6 THE ENTIRE IOS AND NOT A SUBSET OF IT.

10:00AM 7 MR. FERRALL: WELL, WE AGREE THAT IT'S THE ENTIRE
10:00AM 8 IOS.

10:00AM 9 BUT WHAT -- WHERE THE ENTIRE OPERATING SYSTEM -- SORRY,
10:01AM 10 WHERE THE USER INTERFACE PART OF THE OPERATING SYSTEM BEGINNING
10:01AM 11 AND ENDS, IS NOT DEFINED AT ALL, YOUR HONOR.

10:01AM 12 AND IN PARTICULAR, THIS COMES IN THE CODE, CISCO WANTS TO
10:01AM 13 CALL MR. TERRY SLATTERY. MR. TERRY SLATTERY IS A FORMER CISCO
10:01AM 14 CONTRACTOR BACK FROM 1990 -- 1990'S, EARLY 1991. HE IS OFTEN
10:01AM 15 REGARDED AS THE FATHER OF THE CISCO CLI, THOSE ARE LITERALLY
10:01AM 16 THE WORDS.

10:01AM 17 NOW DOES THAT MEAN THAT HE CREATED A LOT OF CLI COMMANDS OR
10:01AM 18 RESPONSES? NO, ACTUALLY HE'S CREDITED, I THINK IN THIS CASE,
10:01AM 19 WITH ONE COMMAND. WHAT HE DID WAS WRITE ALL OF THE UNDERLYING
10:01AM 20 CODE THAT IMPLEMENTS THE CLI. SO THAT'S WHAT HE, AND INDEED A
10:01AM 21 LOT OF PEOPLE REFER TO AS A CRITICAL PART, AT LEAST, OF THE
10:01AM 22 CLI.

10:01AM 23 WE'VE NOT HAD ANY OPPORTUNITY OR ANY REASON TO TRY TO
10:02AM 24 DEFINE WHERE THE CLI IMPLEMENTING CODE BEGINS VERSUS THE REST
10:02AM 25 OF IOS. AND AS I UNDERSTAND IT --

10:02AM 1 THE COURT: BUT WHAT'S THE RELEVANCE OF THE CLI
10:02AM 2 IMPLEMENTING CODE? IT'S NOT AT ISSUE IN THE CASE.

10:02AM 3 MR. FERRALL: IT'S WHAT MAKES THE USER INTERFACE WHAT
10:02AM 4 IT IS. IT'S WHAT MAKES THE USER INTERFACE -- THE EFFORT THAT
10:02AM 5 GOES INTO IMPLEMENTING THE CLI, THAT'S HOW THE USER INTERFACE
10:02AM 6 EXISTS, THAT'S THE CREATIVITY, THAT'S THE CREATIVE WORK THAT
10:02AM 7 WENT INTO IT.

10:02AM 8 THE COURT: I DON'T THINK THAT'S WHAT IS CISCO IS
10:02AM 9 ARGUING, THOUGH.

10:02AM 10 MR. FERRALL: WELL, BUT THAT'S WHAT WE ARE GOING TO
10:02AM 11 ARGUE, THAT'S WHAT CREATES PART OF AT LEAST THE LOOK AND FEEL.

10:02AM 12 WE DON'T THINK THAT IT WAS COPIED, THE SOURCE CODE
10:02AM 13 CERTAINLY WASN'T COPIED. BUT THE WORK THAT GOES INTO AND THE
10:02AM 14 PROCESS OF CREATING THE CLI, INCLUDING ALL ASPECTS OF THE LOOK
10:02AM 15 AND FEEL, NOT JUST WHAT'S ASSERTED IN THIS CASE, THAT'S SURELY
10:03AM 16 RELEVANT FOR THE JURY TO CONSIDER CISCO'S LOOK AND FEEL
10:03AM 17 ARGUMENT.

10:03AM 18 THE COURT: WELL, I'M NOT SAYING IT'S NOT RELEVANT,
10:03AM 19 BECAUSE CERTAINLY THERE -- BUT THIS CASE IS ABOUT THE USER
10:03AM 20 INTERFACE, THAT PORTION OF THE PROGRAM THAT THE ENGINEER SEES
10:03AM 21 AND CONNECTS WITH, NOT THE UNDERLYING SOURCE CODE, EVEN THOUGH
10:03AM 22 THAT CAN BE READ AS WELL.

10:03AM 23 MR. FERRALL: TRUE.

10:03AM 24 THE COURT: SO I GUESS I'M JUST NOT PERSUADED ON
10:03AM 25 THIS.

10:03AM 1 MR. FERRALL: OKAY. CAN I JUST SHOW YOU THIS.

10:03AM 2 THE COURT: YEP, LET'S KEEP GOING.

10:03AM 3 MR. FERRALL: I WANT TO TALK ABOUT THE COMPLAINT AND
10:03AM 4 I WANT TO TALK ABOUT THE NEXT DISCOVERY RESPONSE BECAUSE, OKAY,
10:03AM 5 SO WE ASKED CISCO'S FAIR USE CONTENTIONS, OKAY.

10:03AM 6 BASICALLY, THE INTERROGATORY SAYS, DESCRIBE THE LEGAL
10:03AM 7 FACTUAL BASIS FOR YOUR CONTENTION THAT ARISTA'S USE IS NOT A
10:03AM 8 FAIR USE.

10:03AM 9 AND THEN WE RECITE THE STATUTORY FACTORS OF FAIR USE, AND
10:04AM 10 YOUR HONOR IS VERY FAMILIAR WITH THOSE. OKAY.

10:04AM 11 CISCO'S RESPONSE IS ABOUT 5 OR 8 PAGES LONG, SO I DON'T
10:04AM 12 HAVE IT ALL, BUT THEY GO THROUGH EACH FACTOR. AND IN THE
10:04AM 13 BEGINNING IN THE FIRST FAIR USE FACTOR, THEY DEFINE THE WORK,
10:04AM 14 FOR PURPOSES OF THE ENTIRETY OF THIS ANSWER, ARISTA HAS USED
10:04AM 15 AND CONTINUES TO USE CISCO'S COPYRIGHTED WORKS. FOOTNOTE:
10:04AM 16 CISCO'S COPYRIGHTED WORKS AND CISCO'S COPYRIGHTED WORKS
10:04AM 17 INCLUDES THE COPYRIGHTED OPERATING SYSTEMS AND RELATED
10:04AM 18 DOCUMENTS AS SET FORTH IN PARAGRAPH 25 OF THE SECOND AMENDED
10:04AM 19 COMPLAINT.

10:04AM 20 SO WE GO TO PARAGRAPH 25. THIS IS PARAGRAPH 25. IT'S A
10:04AM 21 LIST OF ALL THE OPERATING SYSTEMS.

10:04AM 22 AGAIN, I'M NOT -- OF COURSE THEY COULD HAVE SAID THAT
10:04AM 23 CISCO'S COPYRIGHTED WORKS ARE THE USER INTERFACE AND THEN
10:04AM 24 PROCEEDED TO ANSWER THE INTERROGATORY.

10:04AM 25 THE COURT: ALL RIGHT. WELL THIS IS A LITTLE BIT --

10:05AM 1 TO ME THIS IS MORE DIRECT.

10:05AM 2 MR. FERRALL: OKAY. AND I WANTED TO ADDRESS

10:05AM 3 SOMETHING THAT IS IN CISCO'S SLIDES ON THIS, BECAUSE CISCO

10:05AM 4 CITES TO PARAGRAPH 28 IN THEIR SLIDES. I JUST WANT TO CLARIFY

10:05AM 5 SOMETHING THAT SO THERE'S NO CONFUSION HERE.

10:05AM 6 THE COURT: OKAY.

10:05AM 7 MR. FERRALL: SLIDE 7 OF CISCO'S SLIDES, QUOTES FROM

10:05AM 8 THE COMPLAINT DOWN AT THE BOTTOM.

10:05AM 9 DO YOU SEE THAT PARAGRAPH 28?

10:05AM 10 THE COURT: UH-HUH.

10:05AM 11 MR. FERRALL: OKAY. AND I DON'T HAVE THE PARAGRAPH

10:05AM 12 ON A SLIDE TO SHOW, BUT THIS IS ACTUALLY WHAT PARAGRAPH 28

10:05AM 13 SAYS. IT BEGINS, "THE CISCO IOS COPYRIGHTED WORKS," NOW YOU

10:05AM 14 SEE THAT'S DEFINED IN PARAGRAPH 25, WHICH IS ON THE SCREEN, AS

10:06AM 15 ALL OF THE OPERATING SYSTEMS.

10:06AM 16 OKAY. PARAGRAPH 28 SAYS -- ARE YOU WITH ME?

10:06AM 17 THE COURT: SO WHICH SLIDE AM I SUPPOSED TO BE

10:06AM 18 LOOKING AT?

10:06AM 19 MR. FERRALL: WE ARE LOOK THE AT CISCO'S SLIDE 7.

10:06AM 20 THE COURT: I HAVE THAT AND IT'S JUST THESE THREE

10:06AM 21 LINES.

10:06AM 22 MR. FERRALL: AND THE ARISTA SLIDE THAT'S UP ON THE

10:06AM 23 SCREEN.

10:06AM 24 THE COURT: YES, OKAY.

10:06AM 25 MR. FERRALL: BECAUSE PARAGRAPH 28 BEGINS WITH A

10:06AM 1 DEFINED TERM, CISCO IOS COPYRIGHTED WORKS.

10:06AM 2 UNFORTUNATELY, THAT'S IN THE COMPLAINT THAT I DON'T HAVE TO
10:06AM 3 SHOW YOU ON THE SCREEN, AND I'M JUST READING IT TO YOU.

10:06AM 4 SO IT SAYS, "CISCO'S COPYRIGHTED WORKS (DEFINED TERMS)
10:06AM 5 INCLUDING THEIR UNIQUE COMMAND EXPRESSIONS, UNIQUE COMMAND MODE
10:06AM 6 STRUCTURE, PROMPTS, AS IS REPRESENTED HERE."

10:06AM 7 SO CISCO OMITTED THE FACT THAT WHAT THEY ARE QUOTING HERE
10:06AM 8 AT THE BOTTOM OF THEIR SLIDE 7 IS ACTUALLY A PARENTHETICAL THAT
10:07AM 9 BEGINS WITH THE WORD INCLUDING THE COMMAND EXPRESSIONS AND
10:07AM 10 UNIQUE COMMAND, OKAY.

10:07AM 11 WHAT IS ACTUALLY EXPLAINED IN THE COMPLAINT AS AN ORIGINAL
10:07AM 12 EXPRESSIVE WORK THAT HAD BEEN DEVELOPED OVER MANY YEARS, IS THE
10:07AM 13 LIST OF OPERATING SYSTEMS, THE DEFINED TERM, CISCO COPYRIGHTED
10:07AM 14 WORK.

10:07AM 15 SO I APOLOGIZE THAT I DON'T HAVE THE COMPLAINT TO SHOW YOU
10:07AM 16 AND THE PARSE THROUGH THIS, BUT YOU WILL SEE PARAGRAPH 28 DOES
10:07AM 17 NOT PURPORT TO SAY THAT THE USER INTERFACE ARE ORIGINAL
10:07AM 18 EXPRESSIVE WORKS. THOSE ARE PART OF ORIGINAL EXPRESSIVE WORKS.

10:07AM 19 OKAY. SO THANK YOU FOR YOUR PATIENCE. LET ME CONTINUE
10:07AM 20 WITH ONE MORE PART OF THAT INTERROGATORY RESPONSE. THAT WAS
10:07AM 21 INTERROGATORY 21. IT DEFINES CISCO COPYRIGHTED WORK IN THE
10:08AM 22 BEGINNING OF THE INTERROGATORY, THEN FACTOR FOUR, WHICH IS
10:08AM 23 CRITICAL FOR THE WORK DEFINITION, BECAUSE AGAIN, IT TALKS ABOUT
10:08AM 24 THE EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR OR VALUE OF
10:08AM 25 THE COPYRIGHTED WORK, CISCO BEGINS ITS ANSWER, THE COPYRIGHTED

10:08AM 1 WORKS AT ISSUE-CISCO'S OPERATING SYSTEMS AND ACCOMPANYING
10:08AM 2 DOCUMENTS ALLOW THE SWITCHES AND ROUTERS TO WORK.

10:08AM 3 OKAY. AND THEN JUST TO CLARIFY THAT THE COPYRIGHTED WORK
10:08AM 4 IS NOT THE INTERFACE, IT SAYS, THE COMMAND LINE INTERFACES THAT
10:08AM 5 ARE THE HEART AND SOUL OF THE OPERATING SYSTEMS.

10:08AM 6 IN OTHER WORDS, IT'S CLARIFYING THE COMMAND LINE INTERFACES
10:08AM 7 ARE NOT THE WORK, THEY ARE A PART OF THE WORK. THEY CAN, OF
10:08AM 8 COURSE, TELL THE JURY THAT THEY ARE THE HEART AND SOUL AND WE
10:08AM 9 WILL DISAGREE. BUT THE HEART AND SOUL IS NOT THE WHOLE THING,
10:08AM 10 THE HEART AND SOUL CAN'T LIVE BY ITSELF.

10:09AM 11 SO AGAIN, THIS IS AT THE VERY CLOSE OF DISCOVERY, HOW
10:09AM 12 ARISTA WOULD HAVE THEN SOMEHOW DETERMINED OR PREPARED EXPERT
10:09AM 13 REPORTS WITH THE UNDERSTANDING THAT THE ASSERTED WORK FOR
10:09AM 14 PURPOSES OF FAIR USE MARKET HARM WAS ONLY THE USER INTERFACE,
10:09AM 15 IT'S JUST NOT, IT'S JUST NOT DISCLOSED HERE, YOUR HONOR.

10:09AM 16 AND TO YOUR CONCERN ABOUT, YOUR CONCERN ABOUT WHAT DOES
10:09AM 17 THIS MEAN FOR THE CASE, FIRST OF ALL, OF COURSE CLEARLY THEY
10:09AM 18 WERE ENTITLED, WE ARE NOT SAYING THEY WEREN'T ENTITLED TO TRY
10:09AM 19 TO DEFINE THE WORK MORE NARROWLY AND WE COULD HAVE THE LEGAL
10:09AM 20 ARGUMENT ABOUT WHETHER THAT'S RECOGNIZED UNDER THE LAW. AND I
10:09AM 21 THINK MR. KWUN HAS SOME STRONG POINTS TO MAKE, I DON'T THINK
10:09AM 22 THE CASE LAW REALLY SUPPORTS IT.

10:09AM 23 BUT THAT'S A LEGAL ARGUMENT WE WOULD HAVE HAD BASED UPON A
10:09AM 24 DISCLOSURE THAT SHOULD HAVE HAPPENED LONG AGO. IT'S NOT A
10:10AM 25 LEGAL ARGUMENT THAT, IT'S NOT SOMETHING THAT THEY WERE

1 PROHIBITED FROM DISCLOSING EARLIER IN THE CASE.

2 SECOND -- HERE WE ARE. FINE, THEY DIDN'T DISCLOSE IT, WE
3 FEEL STRONGLY ABOUT THAT. JUST BECAUSE THE CASE IS ABOUT THE
4 OPERATING SYSTEM DOESN'T MEAN THEY CAN'T ARGUE THAT IT'S THE
5 HEART AND SOUL.

6 THAT'S BEEN THEIR CASE ALL ALONG IS THAT EVEN THOUGH THE
7 WHOLE OPERATING SYSTEM IS THE WORK, THE CLI IS THE HEART AND
8 SOUL.

9 THAT'S A FINE ISSUE FOR THE JURY. THEY CAN MAKE ALL OF THE
10 ARGUMENTS THEY WANT ABOUT IT, I'M SURE THEY THINK THEY'VE GOT
11 SOME GREAT EVIDENCE TO SUPPORT THAT THEORY.

12 SO IT'S CERTAINLY NOT THE CASE THAT THERE'S NOTHING FOR THE
13 JURY TO THINK ABOUT BASED UPON THE THEORY THAT WE'VE PRESENTED
14 ALL ALONG.

15 THE COURT: WELL, I JUST WANT TO MAKE SURE THAT,
16 WELL, UNDER EITHER DEFINITION OF THE WORK, BECAUSE THESE ARE
17 STILL ENORMOUS SCOPE INTO ALL OF THESE WORKS, THAT A JURY IS
18 NOT IMPROPERLY GIVEN THE IMPRESSION THAT THEY JUST NEED TO
19 COMPARE THE LITTLE DROP OF THE COPIED MATERIAL, EVEN ASSUMING
20 EVERYTHING THAT'S ALLEGED TO HAVE BEEN COPIED OR DETERMINED TO
21 HAVE BEEN COPIED WAS THE VAST QUANTITY OF THE WORK, BECAUSE
22 THAT WOULD MAKE THIS RIDICULOUS, I DON'T NEED A TRIAL ON THAT
23 ISSUE, YOU SHOULD BE SETTling IT. YOU SHOULD HAVE SETTLED IT
24 TWO YEARS AGO IF THAT'S ALL IT WAS.

25 SO I'M CONCERNED THAT THERE SEEMS TO BE PLENTY ON BOTH

10:11AM 1 SIDES HERE, THESE ARE SOME SPECIFIC THINGS I DO CERTAINLY WANT
10:11AM 2 TO HEAR FROM CISCO ON.

10:11AM 3 MR. FERRALL: WELL, AS I SAID, YOUR HONOR, I THINK
10:11AM 4 THE THEORY THAT WE HAVE BEEN LITIGATING ALL ALONG, AND THE
10:11AM 5 EXPERT REPORTS ARE REplete WITH THIS, CISCO SAYS THE USER
10:11AM 6 INTERFACE MAY NOT BE ALL OF THE LINES OR CODE, BUT THAT'S
10:11AM 7 IRRELEVANT BECAUSE IT'S REALLY IMPORTANT.

10:11AM 8 AND THEY ARE GOING TO CITE TO LOTS OF DOCUMENTS, AND THEIR
10:11AM 9 EXPERT IS GOING TO SAY IT'S REALLY IMPORTANT, AND THEY ARE
10:12AM 10 GOING TO SAY THAT ARISTA ADMITS THAT IT'S REALLY IMPORTANT, AND
10:12AM 11 WE ARE GOING TO SAY -- WELL ACTUALLY, WE DIDN'T REALLY SAY.

10:12AM 12 SO THAT'S A GREAT FACTUAL BATTLE FOR TRIAL. IT'S
10:12AM 13 CERTAINLY -- THAT'S THE WAY ALL OF THE EXPERT REPORTS HAVE BEEN
10:12AM 14 PREPARED IN THIS CASE, INCLUDING DR. BLACK, WE SAW THE QUOTE
10:12AM 15 ABOUT -- I MEAN, DR. BLACK, ABSOLUTELY HAS ANALYZED ALL OF THE
10:12AM 16 NON-ASSERTED ASPECTS OF ARISTA'S OPERATING SYSTEM TO EXPLAIN
10:12AM 17 TRANSFORMATIVE USE. HIS OPINION IS ALL ABOUT --

10:12AM 18 THE COURT: I'M NOT CONCERNED ABOUT ARISTA'S WORKS,
10:12AM 19 I'M CONCERNED ABOUT CISCO'S WORKS HERE.

10:12AM 20 MR. FERRALL: RIGHT. RIGHT.

10:12AM 21 AND WELL, TO COMPARE THE WAY THE WORKS PERFORM AS A WHOLE,
10:12AM 22 THEY'RE COMPLETELY DIFFERENT IN MANY WAYS. AND WHAT DR. BLACK
10:12AM 23 IS DOING IS HE'S TALKING ABOUT THE WAY ARISTA'S WORKS ARE
10:12AM 24 DIFFERENT AND TRANSFORMATIVE.

10:12AM 25 BUT BEYOND THE USER INTERFACE, FOR SURE. THAT'S THE WAY

10:12AM 1 THIS CASE HAS BEEN LITIGATED FROM THE BEGINNING.

10:13AM 2 SO I THINK TO THE CONTRARY, TO FOCUS THIS CASE NOW TO SAY
10:13AM 3 THAT ALL OF THE WORK THAT WE HAVE BEEN TALKING ABOUT, ALL OF
10:13AM 4 THE DAMAGE REPORTS BASED UPON HARM TO LOST SALES OF PRODUCTS
10:13AM 5 RUNNING THE ENTIRE IOS OR ENTIRE NX-OS, THAT SUDDENLY ALL OF
10:13AM 6 THAT IS NOT RELEVANT, I'M NOT SURE HOW WE TRY THE CASE,
10:13AM 7 FRANKLY.

10:13AM 8 THE COURT: WELL, I'M SURE YOU ARE COMPLETELY READY
10:13AM 9 TO TRY THE CASE THAT WAY.

10:13AM 10 YOU KNOW -- BUT SO, IN OTHER CASES WHERE THE ALLEGATION IS
10:13AM 11 THAT THE SOURCE CODE HAS BEEN COPIED, THEN YOU ARE SUGGESTING
10:13AM 12 THAT THEN THE OPERATING SYSTEM STILL IS THE WORK WITH ALL THE
10:13AM 13 ENORMITY OF ALL THE IRRELEVANT INTERFACE? BECAUSE ALL OF THESE
10:13AM 14 PROGRAMS HAVE INTERFACE AND SOURCE CODE.

10:13AM 15 MR. FERRALL: WELL, YES, ALTHOUGH, LOOK, OBVIOUSLY
10:13AM 16 EVERY CASE IS DIFFERENT. BUT IN THE CASE WHERE THE SOURCE CODE
10:13AM 17 IS TRULY COPIED, THEN THE INTERFACE INEVITABLY IS GOING TO BE
10:14AM 18 THE SAME BECAUSE THE INTERFACE EMERGES FROM THE SOURCE CODE.
10:14AM 19 BUT IN ANY EVENT, IT'S UP TO THE PLAINTIFF TO DEFINE THEIR CASE
10:14AM 20 HOW THEY WANT TO.

10:14AM 21 THE COURT: I GUESS WHAT I HAVE IS A COMPLAINT THAT
10:14AM 22 SEEMS TO WALK THROUGH SOME PRETTY GOOD DEFINITION OF THE WORK
10:14AM 23 IN QUESTION AS BEING THE USER INTERFACE. WHAT YOU ARE SHOWING
10:14AM 24 ME HERE ARE SOME RESPONSES TO INTERROGATORIES AND SOME, AND
10:14AM 25 THEORIES OF DAMAGES THAT MIGHT PERSUADE ME THAT THE DISCLOSURES

10:14AM 1 WENT THE OTHER WAY.

10:14AM 2 MR. FERRALL: WELL, THE COMPLAINT ALLEGES COPYING OF
10:14AM 3 THE USER INTERFACE FOR SURE.

10:14AM 4 THE COURT: YES.

10:14AM 5 MR. FERRALL: BUT AGAIN, LET'S GO BACK A COUPLE OF
10:14AM 6 SLIDES, ONE SLIDE, THIS IS THE IOS COPYRIGHTED WORK. THE
10:14AM 7 DEFINITION AT THE BOTTOM OF PARAGRAPH 25 FROM THE SECOND
10:14AM 8 AMENDED COMPLAINT. THIS LIST OF OPERATING SYSTEMS IS THE IOS
10:15AM 9 COPYRIGHTED WORKS.

10:15AM 10 NOW, THERE'S -- I DON'T THINK THE WORD USER INTERFACE OR
10:15AM 11 EVEN CLI IS EVEN IN THIS PARAGRAPH.

10:15AM 12 SO AGAIN, WE'VE GOT TO KEEP CLEAR, IT'S ONE THING TO SAY
10:15AM 13 WHAT WAS COPIED WAS THE CLI, BUT WHEN IT COMES TO WHAT IS
10:15AM 14 DEFINED AS THE WORKS, THERE'S JUST NEITHER IN THE COMPLAINT NOR
10:15AM 15 IN INTERROGATORIES IS THERE SOMETHING THAT ANY -- THAT WE COULD
10:15AM 16 HAVE POSSIBLY HAVE GOTTEN NOTICE OF THAT THIS WAS GOING TO
10:15AM 17 BE -- THE USER INTERFACE ALONE WAS GOING TO BE THE WORK.

10:15AM 18 SO WITH THAT, YOUR HONOR, I'M OBVIOUSLY HAPPY TO ANSWER ANY
10:15AM 19 FURTHER QUESTIONS, OTHERWISE I WOULD LIKE TO TURN IT OVER TO
10:15AM 20 MR. KWUN TO TALK ABOUT THE LEGAL QUESTIONS A LITTLE BIT.

10:15AM 21 THE COURT: OKAY. MR. KWUN.

10:15AM 22 MR. PAK, I THINK I WILL LET YOU COME BACK ON ALL OF THIS AT
10:16AM 23 ONCE.

10:16AM 24 MR. PAK: WONDERFUL. THANK YOU.

10:16AM 25 MR. KWUN: YOUR HONOR, I DO WANT TO GET INTO THE

1 QUESTION OF WHETHER OR NOT THERE IS A SEPARATE WORK, BUT BEFORE
2 I GET THERE, YOU HAD ASKED A QUESTION EARLIER ABOUT WHETHER OR
3 NOT THERE'S A DE MINIMUS -- FREE-STANDING DE MINIMUS DEFENSE.

4 SO I DID WANT TO CALL YOUR ATTENTION TO THE ORACLE CASE.
5 AND IN 2012 WHEN THE PRIMA FACIE INFRINGEMENT CASE WAS TRIED,
6 THERE WAS A DE MINIMUS DEFENSE THAT WAS, THAT THE JURY WAS
7 INSTRUCTED ON. AND ON APPEAL, ORACLE CHALLENGED WHETHER THERE
8 WAS A FREESTANDING DE MINIMUS DEFENSE. AND THE COURT DID NOT
9 HOLD THAT THERE WAS NO FREESTANDING DE MINIMUS DEFENSE.

10 THE COURT: AS AN AFFIRMATIVE DEFENSE, MR. KWUN?

11 MR. KWUN: AS AN AFFIRMATIVE DEFENSE. I HAVE TO
12 ACTUALLY LOOK AND SEE EXACTLY HOW THAT WAS FRAMED.

13 THE COURT: IT'S ONE OF THOSE TRICKY ISSUES THAT
14 EXIST IN MANY AREAS OF THE LAW AS TO WHETHER IT'S SIMPLY A
15 DEFENSE THAT NEGATES AN ESSENTIAL ELEMENT.

16 MR. KWUN: I THINK THAT YOU ARE ACTUALLY CORRECT THAT
17 IT PROBABLY IS FRAMED AS WHETHER OR NOT THERE IS A PRIMA FACIE
18 CASE, NOT AFFIRMATIVE DEFENSE TO THE PRIMA FACIA CASE.

19 BUT I ACTUALLY HAVE, I DON'T HAVE THE ACTUAL DEFENSE CHARGE
20 BEFORE ME, BUT I DO HAVE FROM THE FEDERAL CIRCUIT OPINION, AT
21 750 F.3D PAGE 1351, JUST A SHORT QUOTATION FROM THE FEDERAL
22 CIRCUIT ABOUT WHAT GOOGLE'S ALLEGATIONS WERE WITH REGARD TO THE
23 DE MINIMUS DEFENSE AND WITH RESPECT TO A CERTAIN PART OF THE
24 INFRINGEMENT CASE.

25 AND THEY QUOTE, JUDGE ALSUP'S FINAL CHARGE AS SAYING: WITH

10:17AM 1 RESPECT TO THE INFRINGEMENT ISSUES CONCERNING THE RANGE CHECK
10:17AM 2 AND OTHER SIMILAR FILES, GOOGLE AGREES THAT THE ACCUSED LINES
10:17AM 3 OF CODE AND COMMENTS CAME FROM THE COPYRIGHTED MATERIAL, BUT
10:17AM 4 CONTENDS THAT THE AMOUNTS INVOLVED WERE SO NEGLIGIBLE AS TO BE
10:17AM 5 DE MINIMUS AND THUS SHOULD BE EXCUSED.

10:18AM 6 AND TO ANOTHER QUESTION YOU HAD ABOUT THE DE MINIMUS
10:18AM 7 DEFENSE, THERE ARE TWO ASPECTS TO A DE MINIMUS DEFENSE IN THE
10:18AM 8 NINTH CIRCUIT, ACTUALLY ANYWHERE, BUT CERTAINLY IN THE
10:18AM 9 NINTH CIRCUIT, AND THAT'S BOTH A QUALITATIVE AND A QUANTITATIVE
10:18AM 10 ASPECT.

10:18AM 11 AND FOR THE DEFENSE TO SUCCEED, THE DEFENSE HAS TO PROVE A
10:18AM 12 LACK OF QUALITATIVE AND QUANTITATIVE IMPORTANCE.

10:18AM 13 SO --

10:18AM 14 THE COURT: WHICH IS EXACTLY THE SAME AS IN THE FAIR
10:18AM 15 USE AFFIRMATIVE DEFENSE.

10:18AM 16 MR. KWUN: BOTH OF THOSE ASPECTS COME INTO FACTOR 3,
10:18AM 17 THEY ARE -- IT IS A DIFFERENT QUESTION BECAUSE YOU WOULD NEVER
10:18AM 18 REACH THE ISSUE OF FAIR USE IF THERE WAS A DE MINIMUS DEFENSE.

10:18AM 19 THE COURT: CLEARLY. I UNDERSTAND THAT.

10:18AM 20 MR. KWUN: THE THRESHOLD IS DIFFERENT.

10:18AM 21 THE COURT: I UNDERSTAND THAT PERFECTLY. BUT --

10:18AM 22 MR. KWUN: SO WHAT I WOULD SAY IT'S PART OF THE PRIMA
10:18AM 23 FACIE INFRINGEMENT CASE, AND THEN IF YOU GET PAST THAT, THERE'S
10:18AM 24 A SECOND QUESTION OF NOT IS IT DE MINIMUS, BUT IS IT
10:18AM 25 SUBSTANTIAL.

10:18AM 1 AND I KNOW, AND WE HAVE THAT WORD SUBSTANTIAL OR
10:18AM 2 SUBSTANTIALLY COMING UP ALL OVER THE PLACE.

10:19AM 3 THE COURT: DIFFERENT SIDE OF THE SAME COIN HERE.

10:19AM 4 MR. KWUN: I AGREE WITH YOUR HONOR THAT SOMEBODY
10:19AM 5 WOULD DO WELL TO RESTATE WHAT THESE DOCTRINES ARE TO USE MORE
10:19AM 6 DIFFERENT WORDS, BUT WE ARE KIND OF STUCK WITH THAT.

10:19AM 7 THE COURT: AND THERE ARE ONLY A FEW WORDS THAT CAN
10:19AM 8 BE USED.

10:19AM 9 MR. KWUN: SO LET ME TURN TO THIS QUESTION OF WHETHER
10:19AM 10 OR NOT THERE IS A SEPARATE WORK WHICH IS THE USER INTERFACE.

10:19AM 11 AND CISCO HAS CITED A NUMBER OF CASES, BUT I THINK WE WOULD
10:19AM 12 ALL AGREE THAT REALLY IT BOILS DOWN TO THE CITATION OF A SINGLE
10:19AM 13 CASE BECAUSE ALL BUT ONE OF THOSE CASES THEMSELVES RELY ON THE
10:19AM 14 MANUFACTURER TECHNOLOGIES V. CAMS CASE.

10:19AM 15 SO THEN THE QUESTION IS, WHAT WAS THE DISTRICT COURT IN
10:19AM 16 CONNECTICUT, ITSELF, RELYING ON? AND IN THAT DECISION, THE
10:19AM 17 COURT WAS ADDRESSING THE ISSUE OF REGISTRATION OF A COMPUTER
10:19AM 18 PROGRAM, AND WHAT PROTECTION THE DISPLAYS CREATED BY THAT
10:19AM 19 PROGRAM GET.

10:19AM 20 AND IS THE 706 F.SUPP AT 991, THE COURT MENTIONS A QUOTE,
10:20AM 21 RECENT DECISION OF THE COPYRIGHT OFFICE. AND THAT RECENT
10:20AM 22 DECISION SAID THAT A SINGLE REGISTRATION OF A COMPUTER PROGRAM
10:20AM 23 EXTENDS PROTECTION TO SCREEN DISPLAYS THAT CONTAIN ORIGINAL
10:20AM 24 EXPRESSION.

10:20AM 25 SO THAT RECENT DECISION WAS A 1988 DECISION FROM THE

10:20AM 1 COPYRIGHT OFFICE. JUNE 1988 DECISION OF THE COPYRIGHT OFFICE.
10:20AM 2 AND I HAVE A COPY OF IT HERE. WE PREVIOUSLY SUBMITTED IT AT
10:20AM 3 ECF 635-4.

10:20AM 4 BUT I HAVE A COPY OF IT WHICH I CAN HAND UP HERE. I'VE HAD
10:20AM 5 SOME -- I'VE TAKEN THE LIBERTY OF HIGHLIGHTING A FEW POINTS ON
10:20AM 6 IT. BUT I WANT TO START WITH THE SUMMARY ON THE FRONT ON THE
10:20AM 7 FIRST PAGE, FIRST COLUMN.

10:20AM 8 AND THE SUMMARY SAYS THAT THE COPYRIGHT OFFICE OF THE
10:20AM 9 LIBRARY OF CONGRESS HAS DETERMINED THAT ALL COPYRIGHTABLE
10:21AM 10 EXPRESSION OWNED BY THE SAME CLAIMANT AND EMBODIED IN A
10:21AM 11 COMPUTER PROGRAM IS CONSIDERED A SINGLE WORK AND SHOULD BE
10:21AM 12 REGISTERED ON A SINGLE APPLICATION FORM.

10:21AM 13 AND I HAVE AN EXCERPT OF THAT UP ON THE SCREEN AS WELL.
10:21AM 14 BUT THERE REALLY ARE TWO POINTS THAT THAT SUMMARY GETS AT.

10:21AM 15 ONE IS THERE WAS AN ONGOING QUESTION OF WHETHER OR NOT THE
10:21AM 16 REGISTRATION OF THE SOURCE CODE DID ANYTHING TO GRANT
10:21AM 17 PROTECTION FOR THE SCREEN DISPLAYS.

10:21AM 18 AND HERE THEY ARE SAYING YES, WHEN YOU FILE THAT SINGLE
10:21AM 19 REGISTRATION, IF THOSE SCREEN DISPLAYS ARE POTENTIALLY
10:21AM 20 PROTECTED BY COPYRIGHT, YOU HAVE TO REGISTER.

10:21AM 21 THERE'S A SECOND QUESTION THOUGH WHICH IS, HOW MANY WORKS
10:21AM 22 HAVE YOU REGISTERED?

10:21AM 23 AND WHAT WE HAVE HEARD FROM CISCO IS THAT BY FILING ONE
10:21AM 24 REGISTRATION THEY HAVE CREATED WHAT THE DISTRICT COURT CALLED
10:21AM 25 THE LEGAL FICTION OF TWO REGISTRATIONS.

10:21AM 1 BUT HERE THE 1988 COPYRIGHT DECISION THAT THE COURT WAS
10:21AM 2 RELYING ON SAYS IT'S CONSIDERED A SINGLE WORK.

10:22AM 3 AND IF YOU LOOK AT THE COPYRIGHT OFFICE'S REASONING, IT
10:22AM 4 ACTUALLY BEARS THIS OUT. AND ON PAGE 3 OF THE DECISION THAT I
10:22AM 5 HANDED UP IN COLUMN 1, PAGE 3 THEY ARE TALKING ABOUT THE FACT
10:22AM 6 THAT THEY HEARD FROM A NUMBER OF INTERESTED WITNESSES ON THIS
10:22AM 7 ISSUE, WHO TOOK A VARIETY OF POSITIONS.

10:22AM 8 AND AT THE END OF THE THIRD FULL PARAGRAPH, WHICH I'VE
10:22AM 9 HIGHLIGHTED IN YELLOW IN THE HAND-UP, THEY SAY THAT ALL
10:22AM 10 WITNESSES AGREED THAT THE SAME SCREEN DISPLAYS CAN BE GENERATED
10:22AM 11 BY SUBSTANTIALLY DIFFERENT COMPUTER PROGRAM CODE.

10:22AM 12 SO THIS WAS THE ISSUE THAT ULTIMATELY CAUSED THE DISTRICT
10:22AM 13 COURT TO SAY, YOU KNOW, WE REALLY NEED TO CONSIDER THESE TO BE
10:22AM 14 SEPARATE WORKS BECAUSE THE SAME SCREEN DISPLAYS CAN BE CREATED
10:22AM 15 BY DIFFERENT COMPUTER CODE.

10:22AM 16 THAT WAS BEFORE THE COPYRIGHT OFFICE, ALL THE PEOPLE WHO
10:22AM 17 HAD DISPUTES OVER WHAT THEY SHOULD DO ALL AGREED THAT THAT WAS
10:23AM 18 TRUE.

10:23AM 19 AND THE COPYRIGHT OFFICE THEN SAID, EVEN ACCEPTING THAT THE
10:23AM 20 NATURE OF AUTHOR SHIP IN SCREENS MAY BE DIFFERENT FROM COMPUTER
10:23AM 21 PROGRAM CODE AUTHOR SHIP THIS DOESN'T ALTER THE FACT THAT THE
10:23AM 22 COMPUTER PROGRAM CODE AND SCREEN DISPLAYS ARE INTEGRALLY
10:23AM 23 RELATED AND ORDINARILY FORM A SINGLE WORK.

10:23AM 24 NOW IT DOES SAY ORDINARILY AND I WILL GET TO A LITTLE LATER
10:23AM 25 WHAT THAT MEANS AND HOW IT COULD POSSIBLY BE DIFFERENT AND WHY

10:23AM 1 WE HAVE A FAILURE OF PROOF ON CISCO'S PART TO SHOW THAT IT
10:23AM 2 ACTUALLY IS DIFFERENT.

10:23AM 3 AND THEY GO ON TO SAY RIGHT AFTER THAT, BACK IN YELLOW ON
10:23AM 4 THE HIGHLIGHTED COPY, INDEED THOSE COMMENTATORS WHO FAVOR
10:23AM 5 EITHER SINGLE OR SEPARATE REGISTRATION MUST CONCEDE THAT THE
10:23AM 6 PROGRAM CODE AND SCREENS ARE CONCEPTUALLY A SINGLE WORK.

10:23AM 7 SO THE COPYRIGHT'S OFFICE ON POSITION IS PRETTY CLEAR AND
10:23AM 8 FRANKLY IT'S A LITTLE CONFUSING HOW WE ENDED UP WHERE WE ARE ON
10:24AM 9 THE DISTRICT COURT'S DECISION.

10:24AM 10 THE COURT: BUT THE DISTRICT COURT'S DECISION TAKES A
10:24AM 11 VERY DIFFERENT VIEW OF THAT LANGUAGE.

10:24AM 12 MR. KWUN: WELL, YOUR HONOR, THE DISTRICT COURT DOES
10:24AM 13 NOT ACTUALLY CITE OR QUOTE THE SINGLE WORK.

10:24AM 14 THE COURT: NO, IT DOESN'T.

10:24AM 15 MR. KWUN: SO THE ONLY THING I CAN THINK IS THAT
10:24AM 16 MAYBE IT MISSED IT.

10:24AM 17 THE KEY ISSUE THAT WAS IN DISPUTE BEFORE THE DISTRICT COURT
10:24AM 18 WAS LESS THE ARE THERE TWO SEPARATE WORKS POINT AND MORE THE,
10:24AM 19 DID THE REGISTRATION OF THE SOURCE CODE ACTUALLY ACCOMPLISH
10:24AM 20 ANYTHING FOR THE SCREEN DISPLAYS.

10:24AM 21 SO --

10:24AM 22 THE COURT: SO THAT IS ANSWERED BY THIS -- SO IF YOU
10:24AM 23 REGISTER YOUR SOURCE CODE, YOU ALSO ARE PROTECTING YOUR USER
10:24AM 24 INTERFACE, THAT'S WHAT THIS WOULD SAY.

10:24AM 25 MR. KWUN: THAT IS ONE THING IT SAYS. IT SAYS YOU

10:24AM 1 ARE PROTECTING THE USER INTERFACE INSOFAR AS IT'S PROTECTABLE.

10:24AM 2 THE COURT: AND YOU DON'T NEED TO REGISTER YOUR
10:24AM 3 SCREEN SHOTS SEPARATELY.

10:24AM 4 MR. KWUN: THAT'S RIGHT. AS A MATTER OF FACT, THEY
10:24AM 5 WOULD RATHER YOU DON'T.

10:24AM 6 THE COURT: THAT'S RIGHT.

10:24AM 7 SO I GUESS I'M JUST CONCERNED THAT MAY BE AS FAR AS THE
10:24AM 8 COPYRIGHT OFFICE WAS GOING. WHAT DOES AN OWNER NEED TO DO TO
10:25AM 9 PROTECT BOTH THEIR SOURCE CODE AND THEIR USER INTERFACE AND THE
10:25AM 10 COPYRIGHT OFFICE SAYS, FILE IT ONCE, YOU GET PROTECTION ON ALL
10:25AM 11 OF IT.

10:25AM 12 MR. KWUN: YOU GET PROTECTION ON ALL OF IT AS A
10:25AM 13 SINGLE WORK. REPEATED THREE TIMES.

10:25AM 14 THE COURT: SO THEN THAT BEGS THE QUESTION OF ARE
10:25AM 15 THEY USING THE WORD WORK THE SAME AS WE DO HERE IN COURT TO
10:25AM 16 LITIGATE THE ISSUE, AND HOW DO I KNOW.

10:25AM 17 MR. KWUN: SO FOR THAT, LET'S ACTUALLY TURN TO WHAT
10:25AM 18 THE NINTH CIRCUIT'S TEST IS FOR WHEN YOU CAN HAVE A SEPARATE
10:25AM 19 WORK. SO THIS GOES TO THE POINT OF ORDINARILY, I THINK.

10:25AM 20 THE COURT: AND WHERE -- DO YOU HAVE A SLIDE?

10:25AM 21 MR. KWUN: I'M GOING TO BACK TO THE SLIDES. I WILL
10:25AM 22 GO STRAIGHT TO SLIDE 31.

10:25AM 23 ACTUALLY, LET ME SEE HERE, I AM GOING TO GO TO SLIDE, MAYBE
10:25AM 24 32.

10:26AM 25 THE COURT: THE ECONOMIC VALUE ISSUE?

10:26AM 1 MR. KWUN: YEAH, YEAH.

10:26AM 2 MR. VAN NEST: IT'S UP.

10:26AM 3 MR. KWUN: YES, HERE WE ARE, YES.

10:26AM 4 THIS IS FROM THE MONGE V. MAYA CASE IN THE NINTH CIRCUIT,
10:26AM 5 AND THE ISSUE THERE WAS WHETHER OR NOT THERE'S 400 WEDDING
10:26AM 6 PHOTOS AND WHETHER OR NOT THEY SHOULD BE TREATED AS A SEPARATE
10:26AM 7 WORK OR AS 400 SEPARATE WORKS.

10:26AM 8 THE NINTH CIRCUIT SAID THAT EACH PHOTO IS A SEPARATE WORK
10:26AM 9 AND WHY, BECAUSE IT CAN LIVE ITS OWN COPYRIGHT LIFE AND HAS
10:26AM 10 INDEPENDENT ECONOMIC VALUE AND IS IN ITSELF VIABLE.

10:26AM 11 SO THIS WAS THE ISSUE THAT THEY WERE CONFRONTING WAS WHAT
10:26AM 12 TO DO ON FACTOR THREE OF FAIR USE.

10:26AM 13 AND CISCO'S RESPONSE IN THE BRIEFING ON A WORK WAS TO SAY
10:26AM 14 WELL THAT'S A FAIR USE FACTOR 3 CASE, THAT'S A DIFFERENT ISSUE.

10:26AM 15 BUT WHAT YOU HEARD MR. PAK SAY UP HERE TODAY IS HE ACCUSED
10:26AM 16 ARISTA OF TAKING INCONSISTENT POSITIONS OF WHAT WORK -- A WORK
10:27AM 17 IS, AND SAID THAT WE NEED TO HAVE A CONSISTENT DEFINITION OF
10:27AM 18 THE WORK.

10:27AM 19 THIS TELLS US WHAT THE DEFINITION OF THE WORK IS FOR FAIR
10:27AM 20 USE FACTOR THREE. WE CAN'T HAVE A DIFFERENT DEFINITION OF A
10:27AM 21 WORK FOR THE PRIMA FACIE CASE, THE AFFIRMATIVE DEFENSE IS, OF
10:27AM 22 COURSE, AN AFFIRMATIVE DEFENSE TO THE PRIMA FACIE CASE.

10:27AM 23 THE COURT: SURE, SURE.

10:27AM 24 MR. KWUN: AND INDEED, THE THIRD FAIR USE FACTOR IS
10:27AM 25 THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION

10:27AM 1 TO THE COPYRIGHTED WORK AS A WHOLE.

10:27AM 2 THE COURT: SO LET ME JUST -- I HAVE THOUGHT ABOUT
10:27AM 3 THIS, BECAUSE YOU BRIEFED THIS ISSUE FOR ME IN YOUR BRIEF ON
10:27AM 4 THIS ISSUE.

10:27AM 5 IF I'M UNDERSTANDING IT CORRECTLY, THE USER INTERFACE IS
10:27AM 6 ONLY THE REFLECTION IN ENGLISH OR READABLE FORM OF THE
10:27AM 7 UNDERLYING CODE, IT DOESN'T LIVE ON ITS OWN. IT CAN'T BE
10:27AM 8 GENERATED.

10:27AM 9 MR. KWUN: CORRECT.

10:27AM 10 THE COURT: IT CAN'T BE GENERATED ON ITS OWN, IT
10:28AM 11 NEEDS CODE TO EXIST.

10:28AM 12 MR. KWUN: NOT ONLY DOES IT NEED CODE TO EXIST, BUT
10:28AM 13 IT'S A PICTURE OF SOME OF THE CODE. AND IT HAS NO REAL
10:28AM 14 PURPOSE.

10:28AM 15 IT'S KIND OF LIKE IF YOU HAVE A STEREO RECEIVER, AND YOU
10:28AM 16 LOOK AT THAT FRONT PANEL, AND IT'S GOT SOME KNOBS ON IT, THOSE
10:28AM 17 KNOBS ARE THE USER INTERFACE TO THAT STEREO RECEIVER.

10:28AM 18 AND IF YOU TRY TO RIP THE FRONT PANEL OFF OF THE STEREO,
10:28AM 19 AND ALL THE WIRES THAT CONNECT TO THE REST OF THE RECEIVER ARE
10:28AM 20 GONE, YOU NO LONGER HAVE ANYTHING THAT HAS INDEPENDENT ECONOMIC
10:28AM 21 VALUE. YOU HAVE A BROKEN PIECE OF METAL.

10:28AM 22 AND THAT BROKEN PIECE OF METAL IS NOT ACTUALLY A REFLECTION
10:28AM 23 OF THE ENTIRE STEREO RECEIVER, THERE'S A WHOLE LOT OF STUFF
10:28AM 24 BACK THERE THAT IS NOT REFLECTED IN THAT FRONT PANEL.

10:28AM 25 THE FRONT PANEL IS A WAY FOR THE USER TO CONTROL THE

10:28AM 1 PORTIONS OF IT THAT ARE CONTROLLABLE BY THE USER. BUT
10:28AM 2 APPROXIMATELY SPEAKING, YES. SO I DO THINK THE POINT IS IT HAS
10:28AM 3 NO WAY OF LIVING SEPARATELY.

10:28AM 4 AND INDEED, IF YOU LOOK AT WHAT CISCO HAS SAID THROUGHOUT
10:28AM 5 THIS CASE, THAT'S WHAT THEY HAVE SAID. AND IF WE CAN GO TO
10:28AM 6 SLIDE 33, THIS IS FROM THE CISCO COMPLAINT, THE CISCO COMPLAINT
10:29AM 7 AT PARAGRAPH 27, SAYS THE CLI IS A KEY COMPONENT OF CISCO'S
10:29AM 8 IOS.

10:29AM 9 SO IT'S NOT THAT SOMETHING THAT HAS A SEPARATE LIFE HAS
10:29AM 10 INDEPENDENT ECONOMIC VALUE THAT IS ITSELF VIABLE, RATHER IT IS
10:29AM 11 A PART.

10:29AM 12 THE COURT: SO I'M STILL, BECAUSE I THINK YOUR LEGAL
10:29AM 13 ARGUMENT IS REALLY ONE THAT I -- THAT IS IMPORTANT FOR ME, AND
10:29AM 14 IT MAY BE RESINATING, THIS INDEPENDENT ECONOMIC VALUE ARGUMENT.

10:29AM 15 OBVIOUSLY THIS IS A NINTH CIRCUIT CASE, BUT IT HAS TO DO
10:29AM 16 WITH PHOTOGRAPHS. THERE ARE OTHER CASES THAT HAVE TO DO WITH A
10:29AM 17 SERIES OF, IT MAY BE CHAPTERS OR ESSAYS IN A BOOK THAT HAVE
10:29AM 18 INDEPENDENT VALUE.

10:29AM 19 THERE'S NOTHING IN THE NINTH CIRCUIT IN ANY DISTRICT COURT
10:29AM 20 CASE THAT HAS DEALT WITH A COMPUTER PROGRAM ON THIS LEVEL, IT
10:30AM 21 SEEMS SO ORDINARY, I'M SURPRISED.

10:30AM 22 MR. KWUN: WELL, YOUR HONOR, I WOULD SAY THAT IT'S A
10:30AM 23 RATHER NOVEL PROPOSITION TO SAY THAT THIS INTERFACE WHICH IS
10:30AM 24 REALLY NOT SEPARABLE IN ANY WAY, SHAPE OR FORM FROM THE REST OF
10:30AM 25 THE WORK COULD SOMEHOW STAND ALONE. THAT'S WHY YOU HAVE THINGS

10:30AM 1 LIKE TELEVISION EPISODES.

10:30AM 2 THE COURT: SO LET ME ASK YOU THIS, YOU ARE TELLING
10:30AM 3 ME THAT DIFFERENT CODE CAN BE USED TO GENERATE THE IDENTICAL
10:30AM 4 USER INTERFACE, CORRECT?

10:30AM 5 MR. KWUN: YES, YOUR HONOR.

10:30AM 6 THE COURT: SO ISN'T THAT ACTUALLY THE DEFINITION OF
10:30AM 7 ITS SEPARATE ECONOMIC VALUE IS THAT IN ORDER FOR THESE -- TO
10:30AM 8 SELL THE PRODUCT OR THE SWITCH, USING WHAT HAS BEEN KNOWN IN
10:30AM 9 THE INDUSTRY, AND I'M GOING TO SAY BEFORE CISCO CAME ON TO THE
10:30AM 10 SCENE WITH ITS IOS, BECAUSE I DON'T WANT TO GET INVOLVED IN
10:30AM 11 THE, IN ITS COPYRIGHTED WORKS, THAT IF A COMPANY, IT'S THE
10:30AM 12 VALUE IS NOT IN THE CODE, THE VALUE IS IN THE USER INTERFACE.

10:31AM 13 SO THAT'S ACTUALLY WHERE THE VALUE IS, ANY CODE CAN BE
10:31AM 14 WRITTEN, ANY CODE THAT WILL GENERATE THIS SCREEN IS WHAT THE
10:31AM 15 VALUE IS. THE VALUE IS THE SCREEN SHOT.

10:31AM 16 MR. KWUN: SO I WOULD SAY THAT ALL OF THE USERS OF
10:31AM 17 THESE SWITCHES WOULD BE A LITTLE SURPRISED TO FIND OUT THAT THE
10:31AM 18 KNOBS ON THE FRONT ARE WHERE THE VALUE IS. THEY LIKE HAVING
10:31AM 19 KNOBS BUT THE VALUE IS HAVING A SWITCH THAT RUNS QUICKLY OR
10:31AM 20 WHATEVER.

10:31AM 21 THE COURT: WELL NO I'M ONLY TALKING WITH THE SOURCE
10:31AM 22 CODE THAT GENERATES THE USER INTERFACE, THERE'S A LOT OF SOURCE
10:31AM 23 CODE THAT'S DOING A LOT OF OTHER STUFF IN THIS IOS; ISN'T THAT
10:31AM 24 RIGHT?

10:31AM 25 MR. KWUN: THAT'S TRUE, ALTHOUGH I DO ULTIMATELY WANT

10:31AM 1 TO POINT OUT THAT THE INTERFACE WE ARE TALKING ABOUT HERE IS
10:31AM 2 DIFFERENT THAN THESE SCREEN DISPLAYS AND THINGS LIKE THAT.

10:31AM 3 THE SCREEN DISPLAYS GET SHOWN TO YOU ON THE SCREEN. YOU
10:31AM 4 SEE THEM AND YOU CHOOSE FROM THEM, IT DIRECTS YOUR ACTION.
10:31AM 5 WHAT YOU SEE ON ONE OF THESE SWITCHES IS YOU SEE A BLANK LINE.

10:31AM 6 SO WHAT WE ARE TALKING ABOUT -- WHAT WE ARE TALKING ABOUT
10:32AM 7 IS THE USER INTERFACE, IS ACTUALLY NOT WHAT IS SHOWN TO THE
10:32AM 8 USER FOR THEM TO CHOOSE HOW TO DO SOMETHING. IT'S ACTUALLY
10:32AM 9 WHAT THE USER TYPES IN.

10:32AM 10 THE USER CAN TYPE IN THINGS FROM WHAT WE ARE CALLING THE
10:32AM 11 USER INTERFACE, AND THEN THE SWITCH WILL THEN UNDERSTAND WHAT
10:32AM 12 YOU ARE SAYING. IT'S ACTUALLY ALMOST A MIRROR IMAGE OF THESE
10:32AM 13 CLASSIC USER INTERFACES.

10:32AM 14 THE COURT: WHAT WAS DESCRIBED TO ME WAY BACK IS IT
10:32AM 15 IS THE SPECIAL COMMON LANGUAGE THAT ENGINEERS CAN USE TO OBTAIN
10:32AM 16 THE RESULT THEY ARE LOOKING FOR.

10:32AM 17 MR. KWUN: YES.

10:32AM 18 SO IT IS AN INTERFACE IN SOME SENSE, BUT I JUST WANTED TO,
10:32AM 19 SINCE WE HAVE ALL OF THESE CASES THAT ARE ABOUT SCREEN DISPLAYS
10:32AM 20 OR THE MACINTOSH USER INTERFACE, THAT IT IS A LITTLE BIT
10:32AM 21 DIFFERENT THAN WHAT WE ARE TALKING ABOUT HERE.

10:32AM 22 BUT TO GET TO THIS POINT OF WHETHER OR NOT IT MATTERS THAT
10:32AM 23 YOU COULD CREATE THE SAME SCREEN DISPLAY OR SAME USER INTERFACE
10:32AM 24 USING DIFFERENT CODE, I WANT TO OFFER YOU THE EXAMPLE OF A
10:32AM 25 SITUATION WHERE SOMEONE WRITES A NOVEL IN ENGLISH AND THEN

10:33AM 1 SOMEBODY DECIDES I WANT TO CAPTURE THE ITALIAN MARKET AND THEY,
10:33AM 2 WITHOUT ANY AUTHORIZATION WHATSOEVER, TRANSLATE IT INTO
10:33AM 3 ITALIAN.

10:33AM 4 AND THE COPYRIGHTED WORK THAT IS ALLEGEDLY INFRINGED THAT
10:33AM 5 THAT CASE, WHEN INEVITABLY THEY BRING THE COPYRIGHT
10:33AM 6 INFRINGEMENT CASE, THE COPYRIGHTED WORK IS NOT SOME NEW
10:33AM 7 ABSTRACTION THAT THE PLAINTIFF GETS TO CREATE SAYING, WELL, I'M
10:33AM 8 NOT SAYING THAT THE BOOK I WROTE IS THE COPYRIGHTED WORK, I'M
10:33AM 9 INSTEAD SAYING THE COPYRIGHTED WORK ARE THE IDEAS THAT ARE
10:33AM 10 EXPRESSED OR THE CONCEPTS AND THE PLOT THAT IS EXPRESSED THERE.

10:33AM 11 THEY ARE STUCK, FOR BETTER OR WORSE, WITH THE COPYRIGHTED
10:33AM 12 WORK THEY ACTUALLY HAVE WHICH IS THE ENGLISH LANGUAGE NOVEL.

10:33AM 13 AND THE DEFENDANT IS FREE TO SAY, EVERY SINGLE ONE OF MY
10:33AM 14 WORDS IS DIFFERENT. IT'S NOT GOING TO BE A VERY GOOD ARGUMENT,
10:33AM 15 BUT THEY ARE FREE TO SAY THAT. THEY ARE FREE TO SAY THAT.

10:33AM 16 THE FACT THAT THE THING THAT WAS ACTUALLY COPIED IS NOT THE
10:33AM 17 LITERAL WORDS OF THE UNDERLYING SOURCE CODE IS, DOES NOT MEAN
10:34AM 18 THAT THE SOURCE CODE FOR THE ENTIRE OPERATING SYSTEM IS NOT THE
10:34AM 19 WORK. IT MEANS THAT THEY HAVE A DIFFERENT THEORY OF COPYING
10:34AM 20 THAN ONE MIGHT HAVE.

10:34AM 21 THE COURT: OR IT'S JUST A DIFFERENT WORK, IT'S JUST
10:34AM 22 THAT IT CAN BE AN ENTIRE WORK OF THE IOS, IT COULD BE -- THE
10:34AM 23 SOURCE CODE COULD BE A SEPARATE WORK OR THE USER INTERFACE.
10:34AM 24 THAT'S WHAT CISCO IS ARGUING.

10:34AM 25 I'M TRYING TO DETERMINE WHETHER I CAN SPLIT THEM, THAT'S

10:34AM 1 THE WHOLE ISSUE HERE. AND THIS SEPARATE ECONOMIC VALUE DOES
10:34AM 2 SEEM TO BE A PREMISE THAT I NEED TO FOLLOW IN THE
10:34AM 3 NINTH CIRCUIT.

10:34AM 4 MR. KWUN: I THINK THE OTHER THING IS, YOU KNOW, YOU
10:34AM 5 WERE GETTING AT THIS POINT OF, ISN'T IT CLEAR WHEN THEY SAY THE
10:34AM 6 USER INTERFACE WHAT THE HECK THEY ARE TALKING ABOUT.

10:34AM 7 AND THE PROBLEM IS THAT THE WAY THESE PROGRAMS ARE WRITTEN,
10:34AM 8 THE WAY THESE OPERATING SYSTEMS ARE WRITTEN, THERE'S THE PART
10:34AM 9 OF THE CODE THAT ACTUALLY DOES SOMETHING, THAT ACTUALLY CHANGES
10:34AM 10 THE SETTING ON A GIVEN PORT OR THAT CREATES A ROUTE BETWEEN TWO
10:34AM 11 POINTS ON A NETWORK. AND THEN THERE'S THE INTERFACE THAT
10:35AM 12 UNDERSTANDS WHAT IT IS YOU WANT.

10:35AM 13 SO IT'S REALLY A TWO PART PROCESS. YOU, AS A NETWORK
10:35AM 14 ENGINEER, TELL THE SWITCH WHAT YOU WANT TO DO, AND STEP 1, THE
10:35AM 15 SWITCH HAS TO UNDERSTAND WHAT IT IS YOU WANT TO DO AND THEN IT
10:35AM 16 HAS TO DO IT.

10:35AM 17 AND SO THE UNDERSTAND WHAT YOU WANT TO DO PART, THAT'S
10:35AM 18 SOMEWHERE APPROXIMATELY SPEAKING, WHAT WE ARE TALKING ABOUT
10:35AM 19 HERE AS THE USER INTERFACE.

10:35AM 20 BUT THE PROBLEM IS THERE IS NOT A CLEAN DIVISION BETWEEN
10:35AM 21 WHEN YOU START DOING ONE PART -- STOP DOING ONE PART AND START
10:35AM 22 DOING THE NEXT. AND WE DON'T HAVE ANY SORT OF CLEAN DEFINITION
10:35AM 23 FROM THE PLAINTIFF DUE TO THE DISCOVERY ISSUES WE MENTIONED.

10:35AM 24 BUT MOREOVER, THE FACT THAT YOU CANNOT DIVIDE IT UP, YOU
10:35AM 25 CAN'T SAY THESE 14 FILES, THESE PRECISELY ARE THE USER

10:35AM 1 INTERFACE, EVEN IF WE ARE NOT TALKING ABOUT CODE COPYING, THAT
10:35AM 2 GOES TO THE FACT THAT THERE IS NOT A SEPARATE, A SEPARATE USER
10:35AM 3 INTERFACE THAT HAS INDEPENDENT ECONOMIC VALUE AND IS ITSELF
10:35AM 4 VIABLE.

10:35AM 5 THE USER INTERFACE IS FUNDAMENTALLY INTERTWINED WITH THE
10:36AM 6 REST OF THE OPERATING SYSTEM, AND IS FUNDAMENTALLY TIED TO IT.
10:36AM 7 IT CANNOT BE, UNDER THE NINTH CIRCUIT'S TEST IT CANNOT BE A
10:36AM 8 SEPARATE WORK.

10:36AM 9 I WOULD ALSO NOTE THAT IN ADDITION TO THE MONGE CASE WHICH
10:36AM 10 IS ABOUT FAIR USE FACTOR 3, THE MONGE CASE ITSELF RELIES ON AN
10:36AM 11 EARLIER NINTH CIRCUIT CASE COLUMBIA PICTURES TELEVISION V.
10:36AM 12 KRYPTON BROADCASTING OF BIRMINGHAM, AND THAT CASE WAS A
10:36AM 13 STATUTORY DAMAGES CASE.

10:36AM 14 MY POINT IS THAT THE NINTH CIRCUIT IS NOT USING A BUNCH OF
10:36AM 15 DIFFERENT TESTS FOR WHAT IS A SEPARATE WORK, THEY ARE RELYING
10:36AM 16 ON A SINGLE DEFINITION.

10:36AM 17 AND THERE HAS BEEN NO RESPONSE FROM CISCO OTHER THAN TO
10:36AM 18 SAY, WELL THE MONGE CASE WAS IRRELEVANT BECAUSE IT'S A FAIR USE
10:36AM 19 FACTOR 3 CASE.

10:36AM 20 THE COURT: AND SO YOU WOULD JUST SAY THAT ALL OF
10:36AM 21 THESE COURTS OUTSIDE OF THE NINTH CIRCUIT THAT HAVE RELIED ON
10:36AM 22 MANUFACTURERS TECH ARE JUST WRONG.

10:36AM 23 MR. KWUN: WELL, YES, BUT I WOULD ALSO SAY THAT MOST
10:37AM 24 OF THEM ACTUALLY WEREN'T CONFRONTING THIS QUESTION.

10:37AM 25 SO I DO THINK THAT THE MANUFACTURERS TECHNOLOGY COURT,

1 ALTHOUGH THE PRIMARY ISSUE BEFORE IT WAS WHETHER THE SCREEN
2 DISPLAYS WERE PROTECTED AT ALL, THAT IT WAS ADDRESSING THIS
3 QUESTION OF WHETHER OR NOT IT WAS A SEPARATE WORK.

4 I THINK IT REACHED A DECISION IT DIDN'T HAVE TO BECAUSE
5 CERTAINLY THE PLAINTIFF COULD HAVE GONE FORWARD AND PROVED
6 INFRINGEMENT OR ATTEMPTED TO PROVE INFRINGEMENT BY RELYING ON
7 THE SIMILARITIES IN THE SCREEN DISPLAYS, EVEN IF THE CODE WAS
8 NOT COPIED. BUT WITHOUT A DOUBT, THAT COURT ACTUALLY
9 CONFRONTED THE ISSUE FOR US.

10 BUT THE OTHER CASES --

11 THE COURT: AND NAPOLI DOESN'T CONFRONT IT?

12 MR. KWUN: SO NAPOLI WAS ACTUALLY A REALLY
13 INTERESTING ONE, BECAUSE ASIDE FROM THE FACT THAT IT WAS
14 VACATED, THE NAPOLI CASE IS REALLY INTERESTING BECAUSE ACTUALLY
15 AS I READ IT CLOSELY, ABSOLUTELY SUPPORTS OUR POSITION, AND LET
16 ME EXPLAIN WHY.

17 SO THE NAPOLI CASE INVOLVED MS. NAPOLI WHO WAS A CONSULTANT
18 FOR SEARS. AND THEY HIRED HER TO WRITE A PROGRAM. AND
19 ACCORDING TO SEARS, THEY HAD PROVIDED HER WITH DETAILED
20 DIAGRAMS OR SOME SUCH FOR THE SCREEN DISPLAYS THEY WANTED.

21 SO THE RELATIONSHIP BETWEEN THE TWO OF THEM SOURED, AND
22 ULTIMATELY EVEN THOUGH SHE GOT PAID \$10,000, SHE SOMEHOW WAS
23 ABLE TO SAY, I WANT ALL OF MY SOURCE CODE BACK, AND FOR
24 WHATEVER REASON, NOTWITHSTANDING THE FACT THEY HAD PAID HER
25 \$10,000, SEARS GAVE BACK ALL OF THAT CODE.

1 MS. NAPOLI THEN SAID OH, BUT SHE KEPT A COPY, SO THAT'S
2 COPYRIGHT INFRINGEMENT AND THEY HAD A LAWSUIT.

3 SEARS HAD A DEFENSE, AND SEAR'S DEFENSE IS THEY SAID SEARS
4 IS A JOINT AUTHOR, AND AS A JOINT AUTHOR, THEY DON'T NEED A
5 LICENSE. THEY CANNOT INFRINGE. AND THEIR JOINT AUTHORSHIP
6 DEFENSE WAS BASED ON THE SCREEN DISPLAYS.

7 SO THIS IS THE CONTEXT IN WHICH THE MANUFACTURERS
8 TECHNOLOGY CASE CAME UP.

9 AND SO SHE SAID, THE PLAINTIFF, THE COPYRIGHT OWNER, SHE
10 SAID OH, BUT MY COPYRIGHT DOESN'T COVER THE SCREEN DISPLAYS AT
11 ALL. WELL, SHE LOST ON THAT BECAUSE THE COPYRIGHT OFFICE
12 CLEARLY SAID IT INCLUDES THE SCREEN DISPLAYS.

13 BUT HOW DOES THIS JOINT AUTHORSHIP ARGUMENT WORK IF THE
14 SCREEN DISPLAYS ARE A SEPARATE COPYRIGHT FROM THE UNDERLYING
15 SOURCE CODE? THE FACT THAT SEARS WAS A JOINT AUTHOR OF THE
16 SCREEN DISPLAYS WOULDN'T GIVE THEM A DEFENSE TO INFRINGEMENT
17 FOR HAVING THE SOURCE CODE.

18 SO -- AND INDEED, THERE'S A FOOTNOTE, FOOTNOTE 4 IN THE
19 NAPOLI DECISION, AND THE COURT SAYS, NAPOLI CANNOT SERIOUSLY
20 DISPUTE THAT WHATEVER WORK SEARS CONTRIBUTED TO WAS TO BE
21 MERGED WITH NAPOLI'S WORK INTO A SINGLE WHOLE.

22 SO THAT IS WHY THERE WAS A LIVE DISPUTE OVER JOINT
23 AUTHORSHIP. THE DISTRICT COURT SAID MS. NAPOLI HAS SWORN ON
24 AFFIDAVIT THAT NOTWITHSTANDING THAT THE SCREEN DISPLAYS IN HER
25 PROGRAM ARE ESSENTIALLY IDENTICAL TO THE ONES THAT SEARS

1 PROVIDED, THAT THAT WAS A MASSIVE COINCIDENCE AND SHE ACTUALLY,
2 ON HER OWN, WITHOUT LOOKING AT THEIR MATERIALS, GENERATED
3 EXACTLY THE SAME SCREEN DISPLAYS.

4 I THINK THE COURT SAID, I CAN'T RESOLVE THAT, THAT'S A
5 FACTUAL DISPUTE.

6 I THINK THAT YOU CAN READ BETWEEN THE LINES THAT THE COURT
7 HAD SOME DOUBTS ABOUT MS. NAPOLI'S POSITION WHICH IS PERHAPS
8 WHY YOU SAW A SETTLEMENT FOUR MONTHS LATER THAT RESULTED IN THE
9 VACATING OF THE DECISION.

10 BUT I DO THINK THE KEY POINT IS THE ENTIRE DISPUTE OVER
11 THIS DEFENSE MADE NO SENSE WHATSOEVER UNLESS YOU ASSUME THAT
12 THE SOURCE CODE AND SCREEN DISPLAYS ARE A SINGLE WORK.

13 SO THE OTHER DECISIONS THAT THEY CITE, THE CLARITY CASE,
14 THE JAMISON CASE, AND SO ON, THOSE GO TO WHAT IS BEING COPIED
15 AND WHETHER OR NOT THE THING THAT IS BEING COPIED IS
16 PROTECTABLE. THEY AREN'T DISCUSSING WHAT THE WORK AS A WHOLE
17 IS.

18 IF YOU LOOK AT THE CLARITY SOFTWARE CASE, THERE IS A BRIEF
19 MENTION, IT'S A WESTLAW CITATION THEY HAVE AT PAGE STAR 10, THE
20 COURT FRAMED THE INFRINGEMENT ISSUE THAT IT WOULD LATER HAVE TO
21 ADDRESS AS WHETHER OR NOT THE ALLEGED COPYING RENDERED THE
22 SOFTWARE INFRINGING, NOT THE SCREEN DISPLAYS, THE SOFTWARE.

23 AND THE JAMISON CASE DOES INDEED CITE MANUFACTURERS
24 TECHNOLOGY, BUT AT STAR 13 IN THAT DECISION HOLDS THAT THE
25 ALLEGEDLY COPIED MATERIAL, THAT THE ALLEGEDLY COPIED MATERIALS

WERE NOT COPYRIGHTABLE AT ALL BECAUSE THEY WERE A METHOD OF OPERATION, AND THEREFORE IT WAS OF COURSE IRRELEVANT WHAT THE WORK AS A WHOLE IS.

AND WE HAVE GONE OVER THE NAPOLI CASE, I THINK IT ACTUALLY GOES THE OTHER WAY.

THEY ALSO CITED A NUMBER OF CASES IN A STRING CITE IN A FOOTNOTE WHERE THEY I THINK WOULD CONCEDE THAT THIS ISSUE OF WHETHER OR NOT THERE IS A HIDDEN SEPARATE REGISTRATION, THAT THAT WAS NOT DIRECTLY CONFRONTED. BUT THEY SAY THAT THE COURTS PROCEEDED UNDER A SEEMING IMPLICIT UNDERSTANDING THAT THE USER INTERFACE WAS A SEPARATE WORK.

I THINK IF YOU LOOK AT THOSE CASES, FIRST OF ALL, YOU WILL SEE THAT THEY TEND TO BE ANALYTIC DISSECTION ORDERS, MUCH LIKE WE ARE ARGUING ABOUT HERE, BUT THEY ARE GOING TO THE INDIVIDUAL ELEMENTS.

SO THEY ARE ADDRESSING WHETHER OR NOT THE INDIVIDUAL ELEMENTS THAT WERE ALLEGEDLY COPIED ARE PROTECTABLE. AND OF COURSE YOU ARE DOING THAT, OF COURSE YOU ARE GOING TO FOCUS ON WHATEVER WAS ALLEGEDLY COPIED.

THE ONE THING I DO WANT TO BRING UP IS I THINK IT WILL PROBABLY BE SLIDE 28 OR 29, SO THIS IS FROM THE SAME 1988 COPYRIGHT OFFICE DECISION WE HAVE BEEN TALKING ABOUT. THIS IS A PROCEDURAL POINT THAT THEY RAISE. ACTUALLY, LET'S GO TO SLIDE 29.

THE COPYRIGHT OFFICE SAYS THAT THEY RECOGNIZE THAT THIS

10:43AM 1 DECISION TO USE A SINGLE APPLICATION MEANS THAT SOMETIMES YOU
10:43AM 2 WILL BE REGISTERING THINGS THAT ARE TEXTUAL AND THINGS THAT ARE
10:43AM 3 VISUAL AT THE SAME TIME.

10:43AM 4 AND THEY SAY, WELL, WHAT YOU OUGHT TO DO IS WE HAVE A
10:43AM 5 SEPARATE FORM FOR LITERARY WORKS AND ONE FOR PERFORMING ARTS,
10:43AM 6 FIGURE OUT WHAT PREDOMINATES IN YOUR PROGRAM AND REGISTER IT
10:43AM 7 THAT WAY.

10:43AM 8 SO LET'S TAKE A LOOK AT THE NEXT SLIDE, THIS IS IN THE
10:43AM 9 APPLE V. MICROSOFT CASE, THIS IS ONE OF THE DECISIONS THEY CITE
10:43AM 10 IN THE FOOTNOTE, THIS IS JUDGE VAUGHN'S DISTRICT COURT
10:43AM 11 DECISION, ACTUALLY ONE OF SEVERAL DISTRICT COURT DECISIONS.

10:43AM 12 THE COURT: YES.

10:43AM 13 MR. KWUN: BUT HE LISTS IN FOOTNOTE 1, THE
10:43AM 14 REGISTRATIONS THAT ARE AT ISSUE. AND YOU WILL SEE THEY ARE ALL
10:43AM 15 PA REGISTRATIONS. AND I WILL ADMIT THAT I DON'T DEAL WITH A
10:43AM 16 LOT OF PERFORMING ARTS CASES, SO I ACTUALLY HAD TO LOOK IT UP.

10:43AM 17 IF WE GO TO THE NEXT SLIDE, THIS IS FROM THE INSTRUCTIONS
10:43AM 18 FOR FORM PA. AND IT MAKES VERY CLEAR IT'S FOR REGISTRATION OF
10:43AM 19 WORKS OF THE PERFORMING ARTS, AND THAT INCLUDES WORKS THAT ARE
10:44AM 20 PERFORMED INDIRECTLY BY MEANS OF ANY DEVICE OR PROCESS.

10:44AM 21 SO WHAT WE HAVE HERE IS WE HAVE THE USER INTERFACE OF THESE
10:44AM 22 PROGRAMS OF MAC PAINT, MAC DRAW AND OF THE MACINTOSH BINDER,
10:44AM 23 AND APPLE REGISTERED THEM AS PRIMARILY A WORK OF PERFORMING ART
10:44AM 24 BECAUSE WHAT THEY WERE MOST INTERESTED IN WAS THE USER
10:44AM 25 INTERFACE. IT'S VERY DIFFERENT FROM OUR SITUATION WHERE WHAT

1 WAS REGISTERED WAS A TX REGISTRATION. WHAT CISCO WAS PRIMARILY
2 INTERESTED IN WAS PROTECTING ITS SOURCE CODE.

3 THE COURT: SO I GUESS WHAT I'M REALLY CONCERNED
4 ABOUT IS THE COPYRIGHT OFFICE TO SAY THAT IF YOU REGISTER YOUR
5 SOURCE CODE YOU ALSO HAVE A REGISTRATION OF YOUR INTERFACE OR
6 YOUR SCREEN SHOTS IS, IT'S PROTECTIVE OF THE COPYRIGHT OFFICE
7 OF NOT BEING INUNDATED WITH TWICE THE NUMBER OF REGISTRATIONS,
8 SO THAT'S EFFICIENT AND APPROPRIATE.

9 BUT THE COPYRIGHT OFFICE IS ONLY CONCERNED ABOUT
10 REGISTRATION AND NOT COPYRIGHTABILITY PER SE. THEY ARE NOT
11 MAKING THAT DETERMINATION.

12 AND SO I DON'T KNOW HOW MUCH TO READ INTO IT, I'M MORE
13 CONCERNED ABOUT THE INDEPENDENT ECONOMIC VALUE ARGUMENT. BUT
14 YOU KNOW, IT WOULD BE -- IF AUTHORS HAVE REGISTERED THEIR
15 SOURCE CODE AND LATER LEARNED THAT THEIR SCREEN SHOTS OR THEIR
16 USER INTERFACE WAS NOT PROTECTED, THAT WOULD BE SHOCKING.

17 AND SO I THINK TO THE EXTENT THAT WE ARE SEEING ANYTHING IN
18 THE COPYRIGHT OFFICE BULLETIN, OR I'M NOT SURE WHETHER THIS IS
19 A DECISION OR AN ANNOUNCEMENT THEY CALL IT, IT IS THAT ONCE YOU
20 REGISTER YOUR SOURCE CODE, IT ALSO COVERS THE USER INTERFACE AS
21 THE REGISTERED WORK. I DON'T KNOW THAT THEY MEAN THAT TO BE
22 THE WORK THAT IS LITIGATED ON A COPYRIGHT INFRINGEMENT WHERE WE
23 ARE DEALING WITH DIFFERENT ISSUES.

24 I JUST THINK YOUR OTHER ARGUMENT, FRANKLY TO ME, IS THE ONE
25 I REALLY HAVE TO FOCUS ON THE INDEPENDENT ECONOMIC VALUE.

10:45AM 1 MR. KWUN: AND I DO THINK ON THAT, THE FACT THAT
10:45AM 2 CISCO HAS PUNTED ENTIRELY AND IT MADE NO ATTEMPT WHATSOEVER TO
10:46AM 3 COME UP WITH ANY EVIDENCE IS DISPOSITIVE.

10:46AM 4 THE COURT: YEAH. OKAY.

10:46AM 5 MR. PAK, WANT TO HEAR FROM YOU, WE NEED TO TAKE A BREAK AT
10:46AM 6 11. I WASN'T EXPECTING THIS TO TAKE TWO HOURS, SO I'M KEEPING
10:46AM 7 AN EYE ON THE TIME. DO YOU THINK YOU CAN FINISH IN 15 MINUTES?

10:46AM 8 MR. PAK: YES, YOUR HONOR.

10:46AM 9 THE COURT: EXCELLENT. THAT WAS THE RIGHT ANSWER.

10:46AM 10 MR. PAK: I THINK I HAVE BEEN ENOUGH TIMES BEFORE
10:46AM 11 YOUR HONOR TO KNOW WHEN TO BE SHORT.

10:46AM 12 YOUR HONOR, FIRST OF ALL, LET'S DEAL WITH THE LEGAL ISSUES
10:46AM 13 FIRST.

10:46AM 14 THE COURT: OKAY.

10:46AM 15 MR. PAK: YOUR HONOR, I THINK IT BEHOOVES US TO GO
10:46AM 16 BACK TO THE MANUFACTURERS TECHNOLOGIES CASE AND READ THAT
10:46AM 17 OPINION AGAIN. I THINK THAT YOU WILL FIND THAT THE JUDGE IN
10:46AM 18 THAT CASE DID AN EXTENSIVE SURVEY OF ALL THE DIFFERENT CIRCUIT
10:46AM 19 HOLDINGS THAT PERTAINED TO THE QUESTION OF USABILITY, TO THE
10:46AM 20 QUESTION OF COPYRIGHTABILITY OF USER INTERFACES, YOU NOTED
10:46AM 21 THERE WAS A SPLIT.

10:46AM 22 HE WENT THROUGH AND ANALYZED THE POLICY RATIONAL. OF
10:47AM 23 COURSE HE CITED THE COPYRIGHT OFFICE DECISION AS PART OF THAT
10:47AM 24 BECAUSE WHAT HE WAS DOING WAS NOT, AS YOUR HONOR CORRECTLY
10:47AM 25 NOTED, DEFERRING TO THE COPYRIGHT OFFICE FOR DECISIONS OF

10:47AM 1 ENFORCEMENT AND COPYRIGHTABILITY. WHAT HE WAS SAYING IS
10:47AM 2 BECAUSE OF THIS NEW POLICY, WHAT ARE THE IMPLICATIONS TO OUR
10:47AM 3 COPYRIGHT POLICIES AND TO OUR COPYRIGHT LAW IF IT IS THAT YOU
10:47AM 4 CAN NO LONGER REGISTER THE USER INTERFACE SEPARATELY FROM THE
10:47AM 5 CODE.

10:47AM 6 AND THERE'S A GREAT DESCRIPTION OF THAT, YOUR HONOR,
10:47AM 7 STARTING ON PARAGRAPH, OR SECTION 3 OF THAT REPORT, IT SAYS,
10:47AM 8 THE COURT IS THEREFORE LEFT WITH A CHOICE BETWEEN TWO
10:47AM 9 ALTERNATIVES. THE COURT NOTES. AND ULTIMATELY SAYS THAT THE
10:47AM 10 SECOND APPROACH AND ONE THAT THIS COURT ADOPTS, IS TO TREAT THE
10:47AM 11 SINGLE REGISTRATION OF THE COMPUTER PROGRAM AS ACCOMPLISHING
10:47AM 12 TWO INTERRELATED YET DISTINCT REGISTRATIONS, DISALLOWS THE
10:47AM 13 COURT TO BUILD ON THE SOFT PLUM CASE WHICH WAS EXTENSIVELY
10:47AM 14 DISCUSSED BY FOCUSING ON THE COPYRIGHTABLE EXPRESSION IN EACH
10:47AM 15 TYPE OF REGISTRATION, AND AVOIDING THE MISTAKE OF IDENTIFYING A
10:48AM 16 PROGRAM'S IDEA WITH THE IDEA OF A PARTICULAR SCREEN DISPLAY.
10:48AM 17 AND ALSO RECOGNIZES THAT A COMPUTER PROGRAM AND ITS SCREEN
10:48AM 18 DISPLAYS ARE FOR COPYRIGHT PURPOSES, FUNDAMENTALLY DISTINCT.

10:48AM 19 THAT LINE OF CASES GOES BACK TO WHELAN, YOUR HONOR, WHELAN,
10:48AM 20 THAT WAS MORE IN THE SOURCE CODE COPYING CONTEXT. BUT THE
10:48AM 21 WHELAN COURT NOTED THE VERY POINT THAT YOUR HONOR HAS BEEN
10:48AM 22 RAISING ALL ALONG WHICH IS, THE ISSUE IS THE OPINION THAT
10:48AM 23 SCREEN OUTPUTS ARE OF NO PROBATIVE WORTH IN DETERMINING WHETHER
10:48AM 24 ONE COMPUTER PROGRAM IS COPIED FROM ANOTHER DIFFERENT PROGRAM
10:48AM 25 CODE BECAUSE DIFFERENT PROGRAMMING LANGUAGES ARE CAPABLE OF

10:48AM 1 PRODUCING THE SAME IDENTICAL SCREEN.

10:48AM 2 SO ALL OF THIS GOES BACK TO THE MANUFACTURERS TECHNOLOGY
10:48AM 3 OPINION BEING PREDICATED ON LEGAL ANALYSIS OF CASE PRECEDENT.
10:48AM 4 OF COURSE ACKNOWLEDGING THE IMPLICATIONS OF THE COPYRIGHT
10:48AM 5 POLICY DECISION, BUT I THINK THIS IS STILL GOOD LAW,
10:48AM 6 YOUR HONOR. I THINK A NUMBER OF COURTS HAVE CITED IT.

10:48AM 7 ALL THE CASES, CASE FACTUAL ISSUES THAT COUNSEL RAISED --
10:49AM 8 THE COURT: SO HOW DO I -- THESE ARE TWO COMPLETELY
10:49AM 9 UNRELATED ISSUES. HOW DO I DEAL WITH THE ISSUE OF INDEPENDENT
10:49AM 10 VALUE?

10:49AM 11 MR. PAK: YES, LET ME DEAL WITH THAT, YOUR HONOR.

10:49AM 12 SO I THINK THE FIRST QUESTION IS, IS IT POSSIBLE TO HAVE
10:49AM 13 COPYRIGHT REGISTRATION IN THE INTERFACE, I THINK MANUFACTURERS
10:49AM 14 TECHNOLOGY IS GOOD LAW, IT SUPPORTS IT.

10:49AM 15 THE NAPOLI CASE SUPPORTS IT, THE FACTUAL DISTINCTIONS THERE
10:49AM 16 ARE RAISED AS TO WHETHER THE PARTICULAR ALLEGATIONS IN THAT
10:49AM 17 CASE WHICH INVOLVE JOINT VENTURE AGREEMENTS, WHETHER THE WORK
10:49AM 18 FOR THE PURPOSE OF THE CONTRACT DISPUTE INCLUDED THE CODE AND
10:49AM 19 THE USER INTERFACE, THAT'S A SEPARATE ISSUE.

10:49AM 20 BUT THE LAW THAT WE CITED TO YOUR HONOR IS STILL GOOD LAW.
10:49AM 21 IT IS LAW THAT THE IS RECOGNIZED BY THE COURTS AROUND THIS
10:49AM 22 COUNTRY THAT SAYS A SINGLE COPYRIGHT REGISTRATION PROVIDES
10:49AM 23 VALUE, PROVIDES REGISTRATION IN THE USER INTERFACE.

10:49AM 24 THE COURT: WELL, I GUESS ONE THING THAT IT SOMEWHAT
10:49AM 25 BEGS THE QUESTION OF IF AN AUTHOR CHOOSES TO REGISTER ONLY ITS

10:50AM 1 USER INTERFACE, IS THAT A WORK? IT'S JUST THE REVERSE OF IT.

10:50AM 2 IF YOU REGISTER YOUR SOURCE CODE, THEN YOU GET YOUR USER
10:50AM 3 INTERFACE WITH IT; AND YOU DON'T HAVE TO MAKE A SEPARATE
10:50AM 4 REGISTRATION.

10:50AM 5 CAN YOU JUST REGISTER YOUR USER INTERFACE BY ITSELF IF YOU
10:50AM 6 WANT, AND ACTUALLY, IT SEEMS AS THOUGH IF THE COPYRIGHT OFFICE
10:50AM 7 IS NOT IN THE POSITION OF DEFINING A WORK IN A LITIGATED CASE,
10:50AM 8 IT'S JUST NOT WHAT IT -- I DON'T SEE HOW IT COULD.

10:50AM 9 IT COULD DEFINE WHAT IS NECESSARY TO REGISTER SOMETHING,
10:50AM 10 AND THAT'S ALL IT'S DOING, THEY DON'T TELL US WHAT'S PROTECTED
10:50AM 11 OR NOT.

10:50AM 12 MR. PAK: IT'S NOT LIKE THE PATENT OFFICE,
10:50AM 13 YOUR HONOR.

10:50AM 14 THE COURT: SO THEY ARE JUST TAKING IT, STAMPING IT
10:50AM 15 ON THE DATE IT'S RECEIVED AND THERE IT IS FOR THE WORLD TO SEE.
10:50AM 16 SO THAT'S WHY I COME AROUND THIS THE OTHER WAY.

10:50AM 17 MR. PAK: YES, SO LET ME ADDRESS THE ECONOMIC VALUE
10:50AM 18 QUESTION.

10:50AM 19 THE COURT: OKAY.

10:50AM 20 MR. PAK: SO THAT'S REALLY A FACTUAL QUESTION,
10:51AM 21 YOUR HONOR, AS TO WHETHER IN THIS CASE, CAN CISCO PROVE THAT
10:51AM 22 THERE IS INDEPENDENT ECONOMIC VALUE TO THE USER INTERFACE
10:51AM 23 INDEPENDENT OF THE PARTICULAR PROGRAMMING CODE OR PROGRAMMING
10:51AM 24 LANGUAGE THAT WAS USED TO GENERATE THAT USER INTERFACE.

10:51AM 25 AND WE HAVE, CONTRARY TO THE ASSERTION, WE HAVE AN

10:51AM 1 INCREDIBLE --

10:51AM 2 THE COURT: AND YOU ARE PREPARED TO PROOF UPON IT.

10:51AM 3 MR. PAK: ABSOLUTELY, YOUR HONOR.

10:51AM 4 WE HAVE AN INCREDIBLE AMOUNT OF ECONOMIC EVIDENCE FROM THE
10:51AM 5 EXPERTS, BUT ALSO HISTORICAL EVIDENCE FROM ARISTA'S OWN
10:51AM 6 WITNESSES TO THAT TALK ABOUT THE VERY IMPORTANT ECONOMIC NEED
10:51AM 7 FOR THEM TO COPY THE CISCO CLI, DESPITE THE FACT THAT THEY ARE
10:51AM 8 USING A COMPLETELY DIFFERENT CODE, DESPITE THE FACT THAT THEY
10:51AM 9 ARE USING A COMPLETELY DIFFERENT CODE, DESPITE THE FACT THAT --

10:51AM 10 THE COURT: SO I CAN'T TELL BY THE FACT THAT YOU ARE
10:51AM 11 SUGGESTING, THAT I WOULD LIKE, AND THOUGHT I WAS ABLE TO MAKE A
10:51AM 12 DETERMINATION NOW --

10:51AM 13 MR. PAK: I THINK YOU CAN, YOUR HONOR.

10:51AM 14 THE COURT: -- OF WHAT THE WORK IS.

10:51AM 15 AND IF I WERE TO AGREE WITH YOU, YOU ARE SUGGESTING THAT
10:52AM 16 YOU RECOGNIZE THAT YOU HAVE A BURDEN TO ESTABLISH THIS ECONOMIC
10:52AM 17 VALUE AND YOUR DAMAGES THEORY COULD FAIL PARTIALLY IF YOU DON'T
10:52AM 18 PROVE THAT.

10:52AM 19 MR. PAK: WHAT I'M SAYING, YOUR HONOR, IS THERE'S A
10:52AM 20 SEPARATE QUESTION IN TERMS OF THE WORK.

10:52AM 21 WE THINK THAT THE WORK DEFINITION SCOPE ISSUE WE ARE
10:52AM 22 DEALING WITH NOW CAN BE RESOLVED ON THE MANUFACTURERS
10:52AM 23 TECHNOLOGIES LINE OF CASES.

10:52AM 24 THIS ARGUMENT THAT SOMEHOW AT THE END OF THE DAY THERE MAY
10:52AM 25 BE A FURTHER REQUIREMENT FOR FAIR USE PURPOSES OR OTHER TYPES

10:52AM 1 OF ANALYSIS, WHERE WE HAVE TO LOOK AT THE ECONOMIC VALUE OF THE
10:52AM 2 WORK, AND DETERMINE WHETHER IT CAN EXIST INDEPENDENTLY OF OTHER
10:52AM 3 ASPECTS OF THE PROGRAM.

10:52AM 4 THE COURT: YOU ARE SAYING THE ECONOMIC VALUE ONLY
10:52AM 5 COMES IN, THAT THE MONGE CASE WAS A --

10:52AM 6 MR. PAK: THAT WAS A FAIR USE CASE THAT WAS TALKING
10:52AM 7 ABOUT -- OF COURSE THE SCOPE HAS TO BE THE SAME, ARE WE TALKING
10:52AM 8 ABOUT USER INTERFACE OR CODE. BUT IN TERMS OF THE FURTHER
10:52AM 9 REQUIREMENTS OF ECONOMIC VALUE, LOOKING AT THE IMPACT ON THE
10:52AM 10 MARKET HARM, THE MARKET HARM OF THAT PARTICULAR COPYRIGHTED
10:52AM 11 WORK, THAT'S WHERE THE ECONOMIC ANALYSIS COMES IN.

10:53AM 12 BUT REALLY, I GO BACK TO WHAT I SAID TO YOUR HONOR, LET'S
10:53AM 13 CUT TO THE CHASE HERE, WHICH IS DR. ELSTEN PROVIDES A ROAD MAP
10:53AM 14 FOR ALL OF THESE QUESTIONS.

10:53AM 15 NUMBER ONE, SHE PUTS A NUMBER, SHE PUT A \$16.4 MILLION
10:53AM 16 NUMBER ON THE CLI, INDEPENDENT OF ANYTHING ELSE. HER
10:53AM 17 APPORTIONMENT ANALYSIS ALONE SHOWS THAT THERE'S ECONOMIC VALUE.
10:53AM 18 WHETHER WE AGREE WITH THAT NUMBER OR IT'S A DIFFERENT NUMBER,
10:53AM 19 AND THIS IS SLIDE 5 AGAIN.

10:53AM 20 THE COURT: SO LET ME, BECAUSE TIME IS SHORT, LET ME
10:53AM 21 WALK THROUGH SOME OF THE ARISTA'S ARGUMENTS.

10:53AM 22 MR. PAK: SURE.

10:53AM 23 THE COURT: BECAUSE ASIDE FROM THE LEGAL ISSUES
10:53AM 24 THERE'S THE DISCLOSURE ISSUE WHICH IS ALWAYS VERY IMPORTANT AND
10:53AM 25 THEY POINT TO YOUR RESPONSE TO INTERROGATORY NUMBER 6,

10:53AM 1 IDENTIFYING COPYRIGHTED WORK AS THE IOS.

10:53AM 2 AND THEN THEY, I MEAN, ESSENTIALLY THERE ARE NUMEROUS
10:53AM 3 INTERROGATORY RESPONSES THAT MR. FERRALL WALKED THROUGH THAT
10:53AM 4 SHOW YOUR IDENTIFICATION.

10:53AM 5 NOW I WASN'T TOO CONCERNED ABOUT THE REGISTERED WORK, I
10:54AM 6 THINK WE PUT THAT TO REST, OR I HAVE. BUT IN OTHER PLACES YOU
10:54AM 7 DID IDENTIFY THE WORK AND DEFINE THE WORK I WAS PARTICULARLY
10:54AM 8 INTERESTED IN THE INTERROGATORY 21. SO 6 AND 21 ARE MY BIGGEST
10:54AM 9 CONCERNS.

10:54AM 10 MR. PAK: YES, YOUR HONOR.

10:54AM 11 SO FIRST OF ALL, LET'S TALK ABOUT DISCOVERY. IT WOULD TAKE
10:54AM 12 ME TWO DAYS TO WALK YOU THROUGH, YOUR HONOR, THROUGH ALL OF THE
10:54AM 13 DISCOVERY RESPONSES IN THIS CASE. DEPOSITION TRANSCRIPTS.

10:54AM 14 THAT'S NOT THE EXERCISE HERE. WE ARE NOT TRYING TO CHERRY
10:54AM 15 PICK A FEW THINGS THAT WERE IN ONE INTERROGATORY RESPONSE AND
10:54AM 16 IGNORE THE TOTALITY OF WHAT'S BEEN SAID.

10:54AM 17 LET ME SHOW YOU ON SLIDE 14, YOUR HONOR. BECAUSE FIRST OF
10:54AM 18 ALL, THE ISSUE IS NOT OPERATING SYSTEM GENERALLY WHETHER WE USE
10:54AM 19 THE WORD OPERATING SYSTEM. OF COURSE WE USE THE WORD OPERATING
10:54AM 20 SYSTEM, YOUR HONOR, BECAUSE THAT'S HOW THE REGISTRATIONS WERE
10:54AM 21 DONE.

10:54AM 22 THE ISSUE IS WHETHER THE COPYRIGHTED WORK AT ISSUE HAS TO
10:55AM 23 BE JUST THE USER INTERFACE, OR USER INTERFACE PLUS CODE.
10:55AM 24 BECAUSE WHAT ARISTA WANTS TO DO, YOUR HONOR, IS TO SAY, BECAUSE
10:55AM 25 COPYRIGHT EXPRESSION DOESN'T PROTECT A FUNCTIONAL SYSTEM, YOU

10:55AM 1 DON'T OWN A COPYRIGHT IN A FUNCTIONAL OPERATING SYSTEM. YOU
10:55AM 2 OWN COPYRIGHT IN THE EXPRESSION THAT'S EMBODIED IN A PRODUCT.

10:55AM 3 THERE ARE ONLY TWO TYPES OF EXPRESSIONS AT ISSUE HERE, IT
10:55AM 4 COULD EITHER BE THE USER INTERFACE OR IT COULD BE THE SOURCE
10:55AM 5 CODE THAT WAS WRITTEN.

10:55AM 6 NOTHING THAT THEY HAVE SHOWN YOU INDICATES WHATSOEVER THAT
10:55AM 7 WE HAVE COLLECTIVELY DEFINED THE COPYRIGHTED WORK AS CODE PLUS
10:55AM 8 USER INTERFACE.

10:55AM 9 AND PARTICULARLY ON SLIDE 14, AS YOU SAW IN SOME OF THE
10:55AM 10 SAME RESPONSES, FOR EXAMPLE NUMBER 21, AND THEN ON ROG NUMBER
10:55AM 11 ONE WHICH IS THE VERY FIRST INTERROGATORY, THEY ASKED ABOUT IN
10:55AM 12 TERMS OF OUR COPYRIGHT INFRINGEMENT ALLEGATIONS. WE TALKED
10:55AM 13 ABOUT THE COPYRIGHTED CLI.

10:55AM 14 SO WE HAVE BEEN VERY CLEAR THAT ALTHOUGH OPERATING SYSTEMS
10:55AM 15 HAVE BOTH A USER INTERFACE --

10:56AM 16 THE COURT: BUT LET'S LOOK AT, YOU KNOW, I GUESS I'M
10:56AM 17 KIND OF HUNG UP ON ARISTA'S SLIDE 13 WITH THAT FOOTNOTE OF YOUR
10:56AM 18 DEFINITION OF CISCO COPYRIGHTED WORKS. AND IT IS DEFINED AS
10:56AM 19 THE OPERATING SYSTEM.

10:56AM 20 MR. PAK: ABSOLUTELY, YOUR HONOR.

10:56AM 21 AND THAT IS, IF YOU THINK ABOUT WHAT WAS REGISTERED AS THE
10:56AM 22 COPYRIGHTED WORK, IT IS THE OPERATING SYSTEM.

10:56AM 23 THE COURT: WELL, IN ONE PLACE YOU CALLED IT THE
10:56AM 24 REGISTERED WORK, I'M GOING TO GIVE YOU A PASS ON THAT, BUT THIS
10:56AM 25 ONE I'M NOT SURE I CAN.

10:56AM 1 MR. PAK: WELL, TWO THINGS, YOUR HONOR.

10:56AM 2 SO THE COPYRIGHTED WORK, AND YOU CAN SEE IT'S COPYRIGHTED
10:56AM 3 WORKS, PLURAL, THE COPYRIGHTED WORKS CLEARLY INCLUDES BOTH THE
10:56AM 4 CODE THAT WAS REGISTERED AS WELL AS THE USER INTERFACE.

10:56AM 5 WHEN THIS TALKS ABOUT COPYRIGHTED OPERATING SYSTEMS AND
10:56AM 6 DOCUMENTATION --

10:56AM 7 THE COURT: WELL MR. FERRALL IS NOT ARGUING OTHERWISE
10:56AM 8 HE JUST SAYS IT'S ONE WORD, IT INCLUDES BOTH.

10:56AM 9 MR. PAK: WHEN IT SAYS COPYRIGHTED OPERATING SYSTEM
10:56AM 10 YOUR HONOR, THIS IS NOT TALKING ABOUT CODE VERSUS USER
10:57AM 11 INTERFACE, WE HAVE BEEN CLEAR THAT WHEN WE TALK ABOUT THE
10:57AM 12 OPERATING SYSTEM WITH RESPECT TO THE COPYRIGHTS AT ISSUE IT'S
10:57AM 13 THE USER INTERFACE COMPONENT OF THAT.

10:57AM 14 THERE'S NOTHING IN THIS STATEMENT YOU ARE SEEING ON PAGE 13
10:57AM 15 THAT INDICATES THAT WE EVER CONTEMPLATED INCLUDING THE CODE AS
10:57AM 16 PART OF THE COPYRIGHTED WORK.

10:57AM 17 THIS LANGUAGE, YOUR HONOR, IS ENTIRELY CONSISTENT WITH THE
10:57AM 18 MANUFACTURERS TECH CASES. WHEN YOU REGISTER A COMPUTER PROGRAM
10:57AM 19 AND YOU SAY I HAVE COPYRIGHTED THE COMPUTER PROGRAM FILE, I'M
10:57AM 20 GETTING A SEPARATE DISTINCT REGISTRATIONS, USER INTERFACE AND
10:57AM 21 CODE.

10:57AM 22 THIS DOESN'T IN ANY WAY NEGATE OR SUGGEST TO YOUR HONOR.
10:57AM 23 BUT MOST IMPORTANTLY, AGAIN IT GOES BACK TO DR. ELSTEN. SO WE
10:57AM 24 CAN SIT HERE AND DR. BLACK AS WELL, BUT DR. ELSTEN MAKE ITS
10:57AM 25 VERY CRYSTAL CLEAR, THIS IS A FAIR USE DISCOVERY RESPONSE

10:57AM 1 YOUR HONOR, CORRECT. THIS IS THE PURPOSE AND CHARACTER OF THE
10:57AM 2 USE. SHE ANALYZED ALL OF THE DISCOVERY RESPONSES, ALL OF OUR
10:58AM 3 ALLEGATIONS BEFORE SHE FORMED HER OPINIONS ON FAIR USE.

10:58AM 4 SO IF YOU GO BACK TO SLIDE 5, MS. ELSTEN ANALYZED ALL OF
10:58AM 5 THESE DISCOVERY RESPONSES IN TOTALITY, NOT JUST THE SNIPPETS
10:58AM 6 THAT I HAVE SHOWN YOU OR NOT JUST THE SNIPPETS THAT COUNSEL FOR
10:58AM 7 ARISTA HAS SHOWN YOU. AND THIS IS WHAT SHE SAYS: I UNDERSTAND
10:58AM 8 THAT THE COPYRIGHTS AT ISSUE DO NOT RELATE TO THE
10:58AM 9 IMPLEMENTATION OF THE CLI, WHICH IS EXECUTED BY THE UNDERLYING
10:58AM 10 SOURCE CODE.

10:58AM 11 THIS RIGHT HERE ANSWERS ALL THE QUESTIONS. BECAUSE AGAIN,
10:58AM 12 WE ARE TALKING ABOUT RULE 26, WE ARE NOT TALKING ABOUT WHETHER
10:58AM 13 WE COULD, IN ISOLATION, CHERRY PICK THIS WORD OR NOT.

10:58AM 14 THEY KNEW. AND THAT ANSWERS THAT QUESTION

10:58AM 15 THE COURT: SO I THINK I'M SATISFIED THAT YOU HAVE
10:58AM 16 GIVEN SUFFICIENT DISCLOSURE UNDER RULE 26.

10:58AM 17 THE ISSUE FOR ME IS THE FINAL ISSUE OF WHETHER I'M GOING TO
10:58AM 18 APPLY OUT-OF-CIRCUIT LAW TO THE DEFINITION OF THE WORK AND
10:58AM 19 ALLOW, REALLY, THE DISAGREEMENT ON THE SCOPE TO PLAY OUT IN THE
10:59AM 20 PRESENTATION OF THE CASE ON FAIR USE.

10:59AM 21 AND IT REALLY GETS DOWN TO WHAT IS THE SUBSTANTIAL PORTION
10:59AM 22 OF THE QUALITATIVE PORTION OF THE PROGRAM.

10:59AM 23 MR. PAK: YES, YOUR HONOR.

10:59AM 24 BUT I DO THINK IT'S IMPORTANT FOR YOUR HONOR TO BE ABLE TO
10:59AM 25 INSTRUCT THE JURY THAT, LOOK, CISCO IS NOT, CONSISTENT WITH ALL

10:59AM 1 OF THESE DISCOVERY RESPONSES AND OUR COMPLAINT, CISCO IS NOT
10:59AM 2 GOING TO COME IN HERE AND ASSERT THAT THE CODE IS THE
10:59AM 3 COPYRIGHTED WORK AT ISSUE.

10:59AM 4 THE COURT: RIGHT.

10:59AM 5 MR. PAK: BECAUSE OTHERWISE THEY HAVE NO IDEA WHAT
10:59AM 6 TYPE OF COPYING IS INVOLVED, WHAT TYPE OF COPYRIGHTABLE ISSUES
10:59AM 7 ARE INVOLVED --

10:59AM 8 THE COURT: I PRESUME I CAN INSTRUCT THE JURY UP
10:59AM 9 FRONT THIS CASE DOESN'T INVOLVE ALLEGATIONS OF COPYING SOURCE
10:59AM 10 CODE.

10:59AM 11 MR. PAK: THAT'S RIGHT, YOUR HONOR.

10:59AM 12 AND I THINK FOR YOU TO THEN SAY THAT THE COPYRIGHTED WORK
10:59AM 13 THAT CISCO IS ALLEGING IS THE USER INTERFACE, I THINK THAT
10:59AM 14 WOULD BE ENTIRELY CONSISTENT WITH THE CASE LAW.

11:00AM 15 THERE'S NOTHING -- EVEN IF YOUR HONOR WANTED TO COUCH IT IN
11:00AM 16 TERMS OF, THIS IS WHAT CISCO IS ALLEGING AS THE COPYRIGHTED
11:00AM 17 WORK, IS THE USER INTERFACE --

11:00AM 18 THE COURT: BUT YOU ARE TELLING ME THAT THE -- I
11:00AM 19 DON'T HAVE TO BE CONCERNED ABOUT NINTH CIRCUIT LAW ON THE
11:00AM 20 INDEPENDENT ECONOMIC VALUE.

11:00AM 21 MR. PAK: ABSOLUTELY NOT, BECAUSE THERE IS NO
11:00AM 22 NINTH CIRCUIT LAW THAT NEGATES ALL THE MANUFACTURING TECHNOLOGY
11:00AM 23 CASES. THIS WASN'T JUST A ONE-DISTRICT CASE, YOUR HONOR, THIS
11:00AM 24 HAS BEEN CITED BY A NUMBER OF COURTS AROUND THE COUNTRY.

11:00AM 25 AND EVEN IN -- AND I WANTED TO NOTE EVEN IN THE ONE

11:00AM 1 NINTH CIRCUIT CASE THAT COUNSEL FOR ARISTA CITED, THEY WERE
11:00AM 2 LOOKING AT SCREEN SHOTS IN THE CONTEXT OF THE OVER ALL USER
11:00AM 3 INTERFACE.

11:00AM 4 THEIR POINT WAS IF I TAKE A FEW SCREEN SHOTS OUT OF THE
11:00AM 5 TOTALITY OF ALL THE SCREEN SHOTS THAT CAN BE GENERATED USER
11:00AM 6 INTERFACE, IS THAT A FAIR WAY TO TREAT THE COPYRIGHTABLE WORK
11:01AM 7 TO SLICE OUT A FEW OF THE SCREENS OUT OF THE MANY SCREENS THAT
11:01AM 8 COULD BE -- IN THAT DISCUSSION THAT THE NINTH CIRCUIT DOES,
11:01AM 9 THERE'S NO DISCUSSION OF CODE.

11:01AM 10 AND THAT'S THE ISSUE, YOUR HONOR. THE CODE IS -- WHAT'S
11:01AM 11 REALLY IMPORTANT IS THEY HAD NEVER CITED TO YOU ANY CASE FROM
11:01AM 12 THE NINTH CIRCUIT THAT SAYS IT WOULD BE WRONG FOR A DISTRICT
11:01AM 13 COURT JUDGE IN OUR CIRCUIT TO ALLOW A PLAINTIFF TO ASSERT A
11:01AM 14 COPYRIGHTED WORK AS THE USER INTERFACE WHEN THEY HAVE --

11:01AM 15 THE COURT: SO HAVE YOU GIVEN ME ANY CASE WHERE USER
11:01AM 16 INTERFACE WAS AT ISSUE?

11:01AM 17 MR. PAK: THE SYNOPSIS CASE, YOUR HONOR, AND --

11:01AM 18 THE COURT: SYNOPSIS WAS USER INTERFACE?

11:01AM 19 MR. PAK: THAT WAS VERY SIMILAR IN TERMS OF THE
11:01AM 20 COMMAND LINE INTERFACE TECHNOLOGY.

11:01AM 21 THERE ARE OTHER CASES, I JUST WANT TO ALSO NOTE THAT IF
11:01AM 22 YOUR HONOR REALLY STOPS TO THINK ABOUT WHAT'S BEING SAID, THINK
11:01AM 23 ABOUT ALL THE MOVIE CASES THAT WE HAVE AND THE MUSIC CASES IN
11:01AM 24 THE NINTH CIRCUIT, IT MAKES NO DIFFERENCE WHETHER I ENCODE A
11:01AM 25 MOVIE USING A DIFFERENT ENCODING SCHEME WHERE THE BITS ARE

11:01AM 1 DIFFERENT. IT DOESN'T MATTER WHETHER I USE FILM OR A VCR TAPE
11:02AM 2 OR A -- AND THEN IN THE NINTH CIRCUIT THERE ARE A COUPLE OF
11:02AM 3 OTHER NINTH CIRCUIT CASES YOUR HONOR THAT WE DID NOTE, THIS IS
11:02AM 4 FOOTNOTE NUMBER ONE, THE APPLE COMPUTER V. MICROSOFT CASE.
11:02AM 5 THAT'S THE NORTHERN CALIFORNIA 1992 CASE.

11:02AM 6 THE COURT: IS THAT ONE OF THE DISTRICT COURT
11:02AM 7 DECISIONS?

11:02AM 8 MR. PAK: THAT'S ONE OF THE DISTRICT COURT CASES,
11:02AM 9 YOUR HONOR.

11:02AM 10 COMPUTER ACCESS TECHNOLOGIES V. CATALYST.

11:02AM 11 THE COURT: AND THESE ARE IN YOUR BRIEF?

11:02AM 12 MR. PAK: THESE ARE IN MY BRIEF, YOUR HONOR.

11:02AM 13 THE COURT: OKAY. WELL, I WILL CERTAINLY HAVE THAT.

11:02AM 14 MR. PAK: SO AGAIN, I THINK WHAT WE ARE ASKING IS WE
11:02AM 15 ARE SAYING WE SHOULD BE ABLE TO ASSERT WHAT WE HAVE DISCLOSED
11:02AM 16 IN DISCOVERY. THERE'S BEEN NO NINTH CIRCUIT LAW THAT PRECLUDES
11:02AM 17 THE ABILITY TO ASSERT COPYRIGHTABLE WORK AS THE USER INTERFACE.

11:02AM 18 THE COURT: WELL, WHEN I CAME IN THIS MORNING I
11:02AM 19 ACTUALLY THOUGHT YOUR POSITION WAS STRONG AND NOT REMARKABLE,
11:02AM 20 AS YOU SAY.

11:02AM 21 LET'S TAKE A BREAK. LET'S COME BACK AT A QUARTER PAST AND
11:02AM 22 THEN WE WILL BE ABLE TO MOVE ON, I HOPE.

11:03AM 23 MR. PAK: THANK YOU, YOUR HONOR.

11:03AM 24 (WHEREUPON A RECESS WAS TAKEN.)

11:18AM 25 THE COURT: ALL RIGHT. IT WOULD BE A PERFECT WORLD

11:18AM 1 IF I HAD, NOW, A COUPLE OF WEEKS TO PREPARE A LENGTHY,
11:18AM 2 THOUGHTFUL WRITTEN ORDER ON THE DEFINITION OF THE WORKS, AND
11:18AM 3 THAT PERFECT WORLD ISN'T WHERE WE ARE LIVING TODAY.

11:18AM 4 AND SO I THINK IT'S IMPORTANT THAT I RULE NOW SO THAT YOU
11:18AM 5 CAN PROCEED TO PREPARING YOUR PRESENTATION FOR TRIAL AND THAT
11:18AM 6 WE CAN HAVE SOME CLEAR JURY INSTRUCTIONS.

11:18AM 7 AND YOU DID BRIEF THIS QUITE A BIT AGO, I DIDN'T PREPARE A
11:18AM 8 WRITTEN ORDER IN ADVANCE OF TODAY'S HEARING.

11:18AM 9 ON THE RULE 26 ISSUE, I'M SATISFIED THAT BY THE SECOND
11:18AM 10 AMENDED COMPLAINT AND THE RESPONSES TO DISCOVERY, THAT CISCO
11:18AM 11 HAS ADEQUATELY DISCLOSED ITS INTENTION TO PROCEED ON THE
11:19AM 12 DEFINITION OF ITS WORKS, INCLUDING ITS USER INTERFACE, AND NOT
11:19AM 13 ITS ENTIRE OPERATING SYSTEM.

11:19AM 14 AND SO ON THAT GROUND, I WILL DENY THE MOTION, OR WHEREVER
11:19AM 15 WE ARE, THE DEFINITION TO STRIKE THE REQUEST FOR THE DEFINITION
11:19AM 16 OF USER INTERFACE AS THE OPERATING SYSTEM.

11:19AM 17 ON THE ISSUE OF THE -- THE LEGAL ISSUE THAT MR. KWUN
11:19AM 18 ARGUED, I THINK IT'S A DIFFICULT ISSUE. I THINK THAT THE CASES
11:19AM 19 THAT ARE CITED PERTAIN TO SPECIFIC FACTUAL CIRCUMSTANCES AND
11:19AM 20 DIFFERENT PROCEDURAL POINTS IN THE CASES, BUT I AM PERSUADED
11:19AM 21 BASED UPON THE MANUFACTURERS TECHNOLOGY CASE, AND THAT LINE OF
11:19AM 22 CASES THAT HAVE BEEN UTILIZED, I DID LOOK BRIEFLY AT THE APPLE
11:19AM 23 V. MICROSOFT DECISION, AND OF COURSE IT WASN'T THE HEART OF
11:19AM 24 THAT DECISION EITHER, BUT IT WAS A CASE THAT WAS BASED ON AN
11:19AM 25 ANALYSIS OF THE USER INTERFACE THAT, IN FACT, THE REGISTRATION

1 OF THE OPERATING SYSTEM IS CREATING HERE TWO SEPARATE
2 REGISTRATIONS AND PROTECTABLE WORKS, AND I WILL ALLOW CISCO TO
3 GO FORWARD ON THE DEFINITION OF ITS WORKS AS EACH OF THE USER
4 INTERFACES RELATED TO THE PARTICULAR VERSION OF THE OPERATING
5 SYSTEM AT ISSUE.

6 I DO AGREE WITH MR. KWUN THAT WHEN WE GET TO THE FAIR USE
7 ARGUMENT IN THE CASE, FOR THAT DEFENSE, THAT WHETHER OR NOT
8 THERE'S INDEPENDENT ECONOMIC VALUE OF THE USER INTERFACE, MAY
9 BE AN ISSUE THAT WILL ALLOW YOU TO COMPLETELY WIN AND PREVAIL
10 ON YOUR FAIR USE DEFENSE. BUT OBVIOUSLY, YOU WOULD HAVE
11 PREFERRED IT TO BE AN ARGUMENT IN THE YOUR ARSENAL AT THE
12 EARLIER STAGE OF DETERMINING INFRINGEMENT AND I RECOGNIZE THAT.

13 BUT THE ISSUE IS CERTAINLY ALIVE, AS YOU HAVE SHOWN ME
14 HERE, AND I THINK THAT WE PERHAPS MOVE THE PRESENTATION OF
15 EVIDENCE DOWN THE ROAD, BUT IT WILL STILL BE AVAILABLE FOR THE
16 PROOF ON THE FAIR USE DEFENSE.

17 ALL RIGHT. LET'S MOVE ON THEN. AND I THOUGHT THIS FIRST
18 PART WOULD TAKE ABOUT 30 MINUTES, SO WE ARE ABOUT
19 TWO-AND-A-HALF HOURS LATE FROM WHERE I THOUGHT WE WOULD BE.
20 SO, YOU ARE, I'M SURE, EXQUISITELY ORGANIZED TO LEAD ME THROUGH
21 THIS, ALTHOUGH I'M NOT SURE HOW IT HAPPENED THAT I TORMENTED
22 YOU OF BRIEFING THIS ISSUE OF ANALYTIC DISSECTION SO MANY
23 TIMES, AND GOING BACK THROUGH THE BRIEFING, I REALLY WAS SORRY
24 YOU HAD DONE THAT SO MANY TIMES, BUT THANK YOU.

25 MR. VAN NEST: DID YOU WANT TO GO TO WHERE YOU

11:21AM 1 STARTED THIS MORNING ON THE LIST OF AGREED POINTS?

11:21AM 2 THE COURT: I GUESS, THAT'S HOW WE TIED IT UP.

11:21AM 3 ORIGINALLY YOU HAD SUGGESTED, MR. VAN NEST, THAT YOU HAD A
11:22AM 4 DIFFERENT WAY YOU WOULD LIKE TO PRESENT IT.

11:22AM 5 MR. VAN NEST: I DON'T THINK SO. I THINK THAT'S
11:22AM 6 FINE.

11:22AM 7 WHAT I WANTED TO DO IS START WHERE WE DID START, AND WE
11:22AM 8 DID, WITH THE ARGUMENTS WE ALREADY HEARD.

11:22AM 9 MR. SILBERT IS HERE AND HE'S PREPARED TO GO THROUGH THAT
11:22AM 10 LIST WITH YOU OF ITEMS THAT ARE NOT PROTECTABLE, MANY OF WHICH
11:22AM 11 ARE STIPULATED, SOME OF WHICH ARE NOT, AND TRY TO GET THAT DONE
11:22AM 12 SO WE CAN HAVE AN INSTRUCTION, EITHER PRELIMINARY OR FINAL ON
11:22AM 13 THAT AND HAVE THAT RESOLVED.

11:22AM 14 THE COURT: AND I'VE ASKED YOU THIS BEFORE, MR. VAN
11:22AM 15 NEST, AND MAYBE YOU WANT TO DEFER TO MR. SILBERT BETTER AND I
11:22AM 16 WILL HEAR FROM EITHER OF YOU. ON THE COMMAND LINES, THE
11:22AM 17 MULTIWORD COMMAND LINES, THERE ARE 508 LINES, AND THERE ARE
11:22AM 18 SOME, YOU'VE CATEGORIZED THEM FOR ME IN DIFFERENT WAYS. BUT
11:22AM 19 IT'S NOT CLEAR TO ME WHETHER I NEED TO LOOK AT EACH ONE OR
11:22AM 20 WHETHER I'M GOING TO TAKE A MORE DISTANT VIEW OF THEM AT A
11:23AM 21 HIGHER LEVEL ANALYSIS.

11:23AM 22 MR. VAN NEST: I THINK IT'S THE LATTER. I AM GOING
11:23AM 23 TO DEFER TO MR. SILBERT, BUT I THINK WE CONCLUDED THAT LOOKING
11:23AM 24 AT EACH ONE WAS NOT PRACTICAL.

11:23AM 25 SO I WILL LET MR. SILBERT ADDRESS THAT.

11:23AM 1 THE COURT: AND MR. PAK, I'M GOING TO, I'M STARTING
11:23AM 2 HERE WITH THE DEFENSE. DO YOU HAVE ANY OBJECTION TO THAT? OR
11:23AM 3 MR. NELSON?

11:23AM 4 MR. NELSON: I'M GOING TO -- YOU WILL HEAR FROM ME
11:23AM 5 TOO. THAT'S FINE, YOUR HONOR. IT'S REALLY HOW YOU WANT TO DO
11:23AM 6 IT AND YOU THINK IS GOING TO BE MORE USEFUL.

11:23AM 7 I KNOW THERE WERE A COUPLE OF THINGS YOU EXPRESSED IN
11:23AM 8 CHAMBERS FRIDAY THAT YOU MIGHT HAVE HAD SOME CONCERNS WITH,
11:23AM 9 SPECIFICALLY THE HIERARCHIES AND MAYBE SOME OF THE MODES AND
11:23AM 10 PROMPTS, SO WE CERTAINLY CAN EXPLAIN THAT.

11:23AM 11 I ALSO PLANNED TO MAYBE EXPLAIN SOME OF THE PROCESS HERE
11:23AM 12 CONSISTENT WITH THE CDN, ON THESE COMMANDS, BUT IT DOESN'T
11:23AM 13 SOUND LIKE YOU ARE REALLY GOING TO THE INDIVIDUAL COMMANDS, SO
11:23AM 14 THAT PART MAY BE SOMETHING WE CAN JUST SKIP OVER.

11:23AM 15 THE COURT: AND I GUESS FOR BOTH OF YOU, ONE OF MY
11:23AM 16 CONCERNS IS THAT I THINK IT COULD BE ERROR IF I SIMPLY HAVE
11:24AM 17 SOME CUT OFF, SAY WITH WORDS AND PHRASES. ANYTHING THAT'S
11:24AM 18 FEWER THAN FOUR WORDS IS OUT. I DON'T THINK I CAN DO THAT.
11:24AM 19 AND ONE WORD IS NOT ON THE TABLE ANYMORE.

11:24AM 20 SO THEN WE HAVE THE, MR. SILBERT, YOU'VE ARGUED IT AS THE
11:24AM 21 NUMBER THAT ARE TWO-WORD PHRASES, AND THE NUMBER OF PHRASES
11:24AM 22 THAT ARE THREE WORDS.

11:24AM 23 AND SO AGAIN, YOU SEEM TO BE ASKING ME TO DRAW A LYNN OF
11:24AM 24 TWO WORDS IS OUT. AND I DON'T ACTUALLY SEE ANY SUPPORT IN THE
11:24AM 25 LAW FOR SUCH A BUTCHER KNIFE APPROACH.

11:24AM 1 MR. SILBERT: AND YOUR HONOR --

11:24AM 2 THE COURT: AND THAT'S ONE ISSUE AND IT'S NOT AT THE
11:24AM 3 TOP OF THE LIST. I'M JUST TRYING TO DECIDE WHETHER THERE ARE
11:24AM 4 REALLY CATEGORIES OR NOT.

11:24AM 5 MR. SILBERT: IT'S ONE ISSUE, BUT I THINK IT IS AN
11:24AM 6 ISSUE THAT CAN MAKE OUR JOBS AND OUR LIVES A LITTLE BIT EASIER
11:24AM 7 AT THIS STAGE OF THE PROCEEDING. AND IT IS AT LEAST ONE POINT
11:25AM 8 ON WHICH I THINK WE ALL AGREE.

11:25AM 9 BECAUSE I UNDERSTOOD YOUR HONOR TO SAY WHEN WE WERE
11:25AM 10 TOGETHER ON FRIDAY THAT YOU WOULD LIKE TO UNDERSTAND SOME
11:25AM 11 INFORMATION AND SOME CONTEXT ABOUT THE INDIVIDUAL WORDS IN THE
11:25AM 12 COMMANDS EVEN SHORT TWO-WORD COMMANDS BEFORE MAKING A DECISION
11:25AM 13 ABOUT THE WORDS AND SHORT PHRASES DOCTRINE. YOU WEREN'T GOING
11:25AM 14 TO USE THAT HIGH LEVEL CUTOFF.

11:25AM 15 THE COURT: THAT'S RIGHT.

11:25AM 16 MR. SILBERT: AND THAT THEN TAKES US, I THINK, TO THE
11:25AM 17 QUESTION YOU STARTED WITH WITH MR. VAN NEST, WHICH IS DO YOU
11:25AM 18 NEED TO AND ARE WE -- SHOULD WE NOW BE GOING KIND OF
11:25AM 19 COMMAND-BY-COMMAND AND MAKING INDIVIDUAL DECISIONS.

11:25AM 20 AND I THINK OUR UNDERSTANDING, AND I BELIEVE THIS IS
11:25AM 21 CONSISTENT WITH CISCO'S UNDERSTANDING OF THIS PRETRIAL PROCESS
11:25AM 22 AT A MINIMUM, THE DECISIONS YOU ARE GOING TO MAKE NOW ARE THAT
11:25AM 23 THEY WOULD NOT INVOLVE THAT LEVEL OF GRANULARITY.

11:25AM 24 WE ARE TRYING TO MAKE THE DECISIONS WE CAN MAKE NOW WITHOUT
11:25AM 25 HAVING TO HEAR EVIDENCE ABOUT WHERE EVERY INDIVIDUAL WORD CAME

11:26AM 1 FROM AND SO FORTH.

11:26AM 2 SO I THINK ON THAT PARTICULAR ISSUE, I THINK THE RESULT IS
11:26AM 3 THAT IT'S NOT SOMETHING YOU PROBABLY COULD TACKLE NOW AND THAT
11:26AM 4 IT'S PENDING YOUR HEARING THE EVIDENCE AT TRIAL.

11:26AM 5 THE COURT: OKAY.

11:26AM 6 SO ARE YOU GOING TO START, JUST WALK THROUGH THE LIST OF
11:26AM 7 ITEMS THAT WE, THAT YOU AGREED UPON FOR THIS HEARING?

11:26AM 8 MR. SILBERT: WELL, YES. I THINK SO.

11:26AM 9 I PLAN TO -- WHAT I PLANNED TO DO WAS TO REFER TO THE LIST
11:26AM 10 WE CREATED IN OUR REVISED PRELIMINARY INSTRUCTION, BECAUSE WHAT
11:26AM 11 YOUR HONOR HAD INDICATED AT THE -- WHEN WE WERE TOGETHER ON
11:26AM 12 FRIDAY WAS YOU DID NOT TO PRESENT A LIST TO THE JURY BUT -- OF
11:26AM 13 WHAT IS -- EVERYONE AGREES IS NOT PROTECTABLE. BUT YOU WANTED
11:26AM 14 IT AT A HIGHER LEVEL I THINK WAS YOUR --

11:26AM 15 THE COURT: THAT'S CORRECT.

11:26AM 16 BUT -- AND I'M SORRY, I HAVE NOTES IN TOO MANY PLACES. BUT
11:27AM 17 I WAS ABLE TO EASILY EXTRACT FROM YOUR BRIEFING, A LIST OF 12
11:27AM 18 SUBJECTS THAT CISCO WAS NOT ASSERTING, SUCH AS INDIVIDUAL
11:27AM 19 ISOLATED WORDS THAT WERE PRE-EXISTING AND WELL KNOWN. YOU ARE
11:27AM 20 NOT ASSERTING THAT.

11:27AM 21 WHAT MR. VAN NEST DID OR SIGNED THIS BRIEF, YOU JUST
11:27AM 22 EXTRACTED WHAT CISCO SAID IN ITS PAPERS, AND YOU QUOTED THEM
11:27AM 23 EXACTLY.

11:27AM 24 MR. NELSON: WELL, I THINK THAT'S RIGHT, YOUR HONOR.
11:27AM 25 AND I HAD ACTUALLY PLANNED TO MAYBE GO THROUGH SOME OF THESE

11:27AM 1 THINGS A BIT TO GIVE SOME CONTEXT BECAUSE I KNOW THAT THERE'S
11:27AM 2 BEEN SOME CONFUSION. I THINK IT PARTICULARLY HELPS WITH
11:27AM 3 RESPECT TO EXPLAINING SOME OF THE HIERARCHIES AND THINGS.

11:27AM 4 BUT ON THAT POINT, IT'S TRUE WHAT WE HAVE GONE THROUGH AND
11:28AM 5 WHAT WE IDENTIFIED IN THE BRIEFING WERE THINGS THAT WE ARE NOT
11:28AM 6 ASSERTING IN THE CASE, RIGHT.

11:28AM 7 AND WE TALKED A BIT ABOUT THIS ON FRIDAY. WE ARE NOT
11:28AM 8 ASSERTING THAT BECAUSE WE USED A PARTICULAR WORD, THAT MAKES
11:28AM 9 THAT COMMAND PROTECTABLE, RIGHT. IT'S THE OVERALL CHOICE IN
11:28AM 10 TERMS OF THE ORDER OF THE WORDS, WHAT PARTICULAR THINGS WERE
11:28AM 11 SELECTED, ALL OF THOSE KINDS OF THINGS.

11:28AM 12 SO WE ARE NOT SAYING WE CAME UP WITH AN INDUSTRY STANDARD
11:28AM 13 TERM. WE ARE NOT SAYING THAT THIS COMMAND IS PROTECTABLE,
11:28AM 14 NECESSARILY, THERE ARE SOME WHERE WE ACTUALLY DID INVENT THE
11:28AM 15 TERMS, BUT EVEN ON THAT BASIS, THAT'S NOT REALLY WHAT WE ARE
11:28AM 16 ARGUING ABOUT HERE.

11:28AM 17 SO WE ARE NOT GOING THROUGH AND SAYING HEY, BECAUSE WE
11:28AM 18 PICKED THIS WORD, BPDU, THAT MAKES THIS COMMAND PROTECTABLE.
11:28AM 19 THAT ISN'T THE LEVEL OF ASSERTION THAT WE ARE TALKING ABOUT
11:28AM 20 HERE. AND THAT'S WHAT WE HAD KIND OF GONE THROUGH BECAUSE
11:29AM 21 MAYBE IT SIMPLIFIES THINGS FOR YOUR HONOR.

11:29AM 22 THE ONLY CONCERN THAT I HAVE WITH RESPECT TO THE JURY
11:29AM 23 INSTRUCTIONS, AND THIS WAS DISCUSSED A BIT BY MR. PAK IN
11:29AM 24 CHAMBERS ON FRIDAY AS WELL, IS WE DON'T WANT TO CREATE THE
11:29AM 25 IMPRESSION THAT YOU CROSSED THOSE WORDS OUT. YOU KNOW WHAT I'M

11:29AM 1 SAYING. AND YOUR HONOR TALKED ABOUT THAT.

11:29AM 2 SO LET'S SAY THEY OFFER A TERM, AND IT'S THREE-WORDS IN THE
11:29AM 3 COMMAND OR FOUR, WHATEVER, AND DR. BLACK GETS UP AND SAYS, WELL
11:29AM 4 THIS TERM, THIS WORD IS AN INDUSTRY STANDARD TERM, RIGHT.
11:29AM 5 MEANING IT PRE-EXISTED AND PEOPLE USED IT AND WHATEVER.

11:29AM 6 THE COURT: YEAH, YEAH.

11:29AM 7 MR. NELSON: THEREFORE BLACK IT OUT. THAT'S NOT WHAT
11:29AM 8 YOU DO.

11:29AM 9 BUT I AGREE THAT ON THE BASIS OF THOSE TERMS, THAT ISN'T A
11:29AM 10 BASIS UPON WHICH WE'RE ASSERTING ORIGINALITY.

11:29AM 11 THE COURT: AND THE JURY IS GOING TO HAVE TO
11:29AM 12 DETERMINE WHETHER THERE IS THE CREATIVE SPARK IN COMBINING
11:29AM 13 THOSE TERMS.

11:29AM 14 MR. NELSON: CORRECT.

11:29AM 15 THE COURT: AND I'M HOPING TO SEPARATE THIS ARGUMENT
11:29AM 16 FROM THE JURY INSTRUCTIONS, BUT IN THAT PRELIMINARY
11:30AM 17 INSTRUCTION, WHAT I WOULD LIKE TO DO IS TO DRAW SOME OF THOSE
11:30AM 18 DISTINCTIONS FOR THE JURY.

11:30AM 19 YOU WILL NOT BE ASKED TO DETERMINE IF AN INDIVIDUAL WORD IS
11:30AM 20 PROTECTABLE UNDER THE COPYRIGHT LAWS, RATHER YOU ARE GOING TO
11:30AM 21 BE ASKED TO DETERMINE WHETHER CISCO HAS PROVED ORIGINALITY OR
11:30AM 22 COPYRIGHTABILITY, WHATEVER WORD WE WANT TO DO, IN THE CREATION
11:30AM 23 OF THE COMBINATION OF WORDS.

11:30AM 24 MR. NELSON: EXACTLY.

11:30AM 25 THE COURT: THAT'S AT A HIGH LEVEL VERY SIMPLE

11:30AM 1 WITHOUT REALLY GETTING INTO THE LAW, OF JUST SORT OF WARNING
11:30AM 2 THEM OFF OF SOME THINGS THAT ARE NOT ON THE TABLE.

11:30AM 3 AND THIS I THINK SPEAKS TO ARISTA'S CONCERN THAT THEY NOT
11:30AM 4 BE DRAWN INTO SEEING COPYING OF THINGS THAT AREN'T PROTECTABLE
11:30AM 5 BEFORE THEY GET THE INSTRUCTION. IT WILL BE HARD TO SHAKE THEM
11:30AM 6 FROM THAT BELIEF. AND SO I WANT TO DO THAT, BUT I WANT TO DO
11:30AM 7 THAT IN A VERY NEUTRAL WAY.

11:31AM 8 YOU ARE NOT GOING TO BE ASKED TO DO THIS, YOU ARE GOING TO
11:31AM 9 BE ASKED TO DO THIS. AND THE HAVE A FEW CATEGORIES LIKE THAT,
11:31AM 10 THAT'S WHAT I WAS LOOKING AT IN INSTRUCTION NUMBER 12, THAT I
11:31AM 11 THOUGHT JUST GOT TOO GRANULAR FOR AN EARLY PHASE. BUT THAT
11:31AM 12 KIND OF BEGS THE QUESTION OF WHAT WE ARE GOING TO TAKE OFF THE
11:31AM 13 TABLE.

11:31AM 14 SO MR. NELSON, CISCO HAS ACKNOWLEDGED A NUMBER OF THINGS
11:31AM 15 IT'S NOT SEEKING PROTECTION ON. SOME OF THEM ARE SO
11:31AM 16 COMPLICATED THAT IT WOULD CONFUSE THE JURY TO EVEN TELL THEM
11:31AM 17 WHAT IT IS AND THEN NEVER MIND.

11:31AM 18 AND I THINK IN YOUR ARGUMENT AND THE JURY INSTRUCTIONS,
11:31AM 19 YOU'VE SUGGESTED THAT. AND I AGREE WITH YOU.

11:31AM 20 SO MY LIST OF 12, SOME OF THEM ARE VERY DIFFICULT TO EVEN
11:31AM 21 UNDERSTAND, THEY ARE SO SPECIFIC.

11:31AM 22 MR. SILBERT: YOUR HONOR, IF I MAY JUST AS A PROCESS
11:31AM 23 POINT, BECAUSE I'M NOT SURE WE WERE CLEAR.

11:31AM 24 WE DID, AFTER WE WERE TOGETHER ON FRIDAY, YOUR HONOR SAID
11:31AM 25 SOMETHING SIMILAR TO WHAT YOU JUST SAID, WHICH WAS THE LIST WE

11:31AM 1 HAD WHICH WAS THE SAME LIST WE EXTRACTED FROM CISCO'S BRIEFING
11:32AM 2 IN OUR ORIGINAL INSTRUCTION 12 WAS TOO GRANULAR TO PRESENT.

11:32AM 3 THE COURT: YEAH.

11:32AM 4 MR. SILBERT: AND THAT YOU PREFERRED SOMETHING HIGH
11:32AM 5 LEVEL.

11:32AM 6 WE DID GO AND REVISE IT.

11:32AM 7 THE COURT: OH, GOOD.

11:32AM 8 MR. SILBERT: AND WE FILED IT, I BELIEVE LAST NIGHT.
11:32AM 9 WE MADE AN ATTEMPT TO DO A MORE HIGH LEVEL.

11:32AM 10 THE COURT: SO MINE IS THE SECOND ONE.

11:32AM 11 MR. SILBERT: PROBABLY THE OLDER ONE.

11:32AM 12 THE COURT: I CAN'T KEEP READING WHAT AMOUNTS TO
11:32AM 13 400 PAGES EVERY TIME YOU PUT IT OUT, SO I'VE STOPPED READING.

11:32AM 14 AND YOU CAN GIVE ME A REDRAFTED ONE INDIVIDUALLY, BUT I'M
11:32AM 15 NOT GOING TO HUNT THROUGH. AND YOU FILED IT CORRECTLY,
11:32AM 16 MR. SILBERT, BUT I'M NOT READING IT. I AM NOT READING IT, AND
11:32AM 17 I CAN'T BECAUSE I DON'T HAVE ANOTHER 30 HOURS TO START OVER
11:32AM 18 AGAIN ON TRYING TO PARSE WHAT SHOULD HAVE BEEN 400 PAGES BUT
11:32AM 19 YOU CHOSE, BOTH OF YOU, TO SINGLE-SPACE 200 PAGES OF DOCUMENT.

11:32AM 20 SO I'M GLAD YOU FILED IT, AND IF YOU WANT IT USED, YOU ARE
11:32AM 21 GOING TO HAVE TO POINT IT OUT TO ME, BECAUSE I'M NOT READING
11:32AM 22 WHAT YOU GAVE ME.

11:33AM 23 MR. SILBERT: ABSOLUTELY, UNDERSTOOD.

11:33AM 24 THE COURT: I THINK THEN, MR. SILBERT, I BETTER LET
11:33AM 25 MR. NELSON START BECAUSE I DON'T KNOW HOW YOU WANT TO ORGANIZE

11:33AM 1 THIS DISCUSSION, AND IT'S NOT EXACTLY CLEAR WHAT YOU ARE
11:33AM 2 EXPECTING AS A RESULT OF THIS ARGUMENT.

11:33AM 3 WE WILL GO FOR ABOUT A HALF AN HOUR AND THEN TAKE OUR LUNCH
11:33AM 4 BREAK, AND THEN WE WILL COME BACK THIS AFTERNOON.

11:33AM 5 SO I'M SORRY, MR. SILBERT, WE ARE JUST GOING TO TRADE
11:33AM 6 PLACES HERE.

11:33AM 7 MR. SILBERT: THAT'S FINE.

11:33AM 8 MR. NELSON: I HAVE SOME SLIDES TOO, YOUR HONOR.

11:33AM 9 AND DON'T GET CONCERNED BY THE THICKNESS BECAUSE I DON'T
11:33AM 10 USE THEM ALL, SOME OF THEM IS JUST WHAT YOU ARE INTERESTED IN.
11:33AM 11 AND SOME OF THEM THERE'S, LIKE, SOME PRINTED OUT ANIMATIONS.
11:33AM 12 AND YOU KNOW WHEN YOU DO AN ANIMATION, IT MAKES A LOT OF PAGES.

11:33AM 13 SO LET ME JUST FIRST START WITH SOMETHING PROBABLY MAYBE A
11:33AM 14 LITTLE TOO BASIC, BUT I WOULD JUST LIKE TO MAKE SURE WE ARE ON
11:33AM 15 THE SAME PAGE IN THE PROCESS.

11:33AM 16 SO THE WAY I UNDERSTAND THIS, WHAT WE ARE DOING NOW, SO
11:34AM 17 WE'VE DEFINED THE WORK, THE WORK HAS WHAT THE WORK HAS, AND WE
11:34AM 18 ALLEGE THAT THEY COPIED SOME PORTION OF THAT, RIGHT.

11:34AM 19 BUT THEN IT ISN'T NECESSARILY JUST SIMPLY UP TO US ABOUT
11:34AM 20 WHETHER WE CAN ARGUE THOSE THINGS TO THE JURY, SAY HEY, LOOK,
11:34AM 21 THEY COPIED THIS, THEY COPIED THAT, BECAUSE THERE MAY BE SOME
11:34AM 22 THINGS THAT YOUR HONOR THINKS BASED UPON THE LAW, THAT NO, NO,
11:34AM 23 NO, YOU CAN'T ARGUE THAT BECAUSE THAT REALLY ISN'T SOMETHING
11:34AM 24 THAT'S PROTECTABLE UNDER THE LAW, SO I'M NOT GOING TO LET YOU
11:34AM 25 DO THAT BECAUSE THEY COULD GET THE WRONG IDEA AND BASE

11:34AM 1 INFRINGEMENT ON A WRONG THING.

11:34AM 2 SO WHAT WE ARE TRYING TO DO HERE IS FIGURE OUT WHAT THOSE
11:34AM 3 GUIDELINES ARE, THE PARAMETERS AROUND WHAT THAT EVIDENCE IS
11:34AM 4 THAT I CAN OFFER. ME AND MY COLLEAGUES, BUT FROM THE CISCO
11:34AM 5 SIDE.

11:34AM 6 SO WITH THAT, I KNOW THAT THERE'S BEEN SOME DISCUSSION IN
11:34AM 7 THE PAST, BUT I THINK IT'S HELPFUL TO UNDERSTAND SOME OF THE
11:34AM 8 CONTEXT OF WHAT THESE ARE AND WHAT CHOICES GO IN. BECAUSE WHEN
11:35AM 9 WE ARE TALKING ABOUT TEXTUAL, RELATIVELY SMALL TEXTUAL PHRASES,
11:35AM 10 FOR LACK OF A BETTER TERM, YOU KNOW, SOME OF THEM TWO WORDS,
11:35AM 11 SOME OF THEM, 3, 4, 5, YOU KNOW YOU KIND OF GET THE IMPRESSION
11:35AM 12 AFTER THE FACT, THAT SEEMS PRETTY BASIC, RIGHT. IT HAPPENS A
11:35AM 13 LOT OF TIMES.

11:35AM 14 THE COURT: WELL, IT SEEMS BASIC, BUT REALLY, IT GETS
11:35AM 15 TO ME, GETS TO THE POINT WHERE THERE'S REALLY ONLY ONE WAY TO
11:35AM 16 SAY, SET CLOCK.

11:35AM 17 MR. NELSON: THAT'S WHY I WANT TO TALK ABOUT SOME OF
11:35AM 18 THESE THINGS TO GIVE SOME CONTEXT.

11:35AM 19 OBVIOUSLY YOUR HONOR IS GOING TO MAKE THE DECISION IN THE
11:35AM 20 END, AND THAT'S YOUR JOB. I DON'T GET PAID FOR THAT. ALL I
11:35AM 21 GET PAID IS TO TRY TO SHOW YOU THE INFORMATION FOR YOU TO DO
11:35AM 22 THAT.

11:35AM 23 SO THAT'S WHAT I'M TRYING TO DO HERE, AND IF I'M NOT
11:35AM 24 HELPFUL, PLEASE TELL ME AND I WILL MOVE ON TO SOMETHING ELSE.

11:35AM 25 SO YOU KNOW, ONE OF THE THINGS, IF I GO TO THE FIRST SLIDE

11:35AM 1 HERE, JUST FOR ONE TEXT HERE, WE ARE NOT CLAIMING THIS AS A
11:35AM 2 PROTECTABLE ELEMENT, BUT IT IS IMPORTANT TO UNDERSTAND JUST ON
11:35AM 3 THIS CONCEPT THAT YOUR HONOR SAID ABOUT THE IDEA THAT THERE'S
11:36AM 4 ONLY ONE WAY TO DO THIS, BECAUSE THAT IS PART OF THE MAIN THEME
11:36AM 5 THAT WE HEAR FROM ARISTA OR AT LEAST A VERY SMALL SUBSET OF
11:36AM 6 WAYS TO DO THIS.

11:36AM 7 SO I MEAN, THAT'S NOT EVEN TRUE FROM THE BEGINNING, AND
11:36AM 8 WE'VE TALKED ABOUT THAT, THAT THERE ARE, AND OTHER PEOPLE OUT
11:36AM 9 THERE IN THE INDUSTRY USED THESE DIFFERENT TYPES OF INTERFACES,
11:36AM 10 RIGHT.

11:36AM 11 AND SO WHAT CISCO PICKED IS THIS COMMAND LINE INTERFACE
11:36AM 12 WHICH IS A YOUR TEXTUALLY BASED, BUT THERE ARE OTHERS OUT THERE
11:36AM 13 THAT HAVE MORE, IF WE WERE THINKING ABOUT WINDOWS, THE
11:36AM 14 GRAPHICAL USER INTERFACE, THE MENU DRIVEN USER INTERFACE, THOSE
11:36AM 15 THINGS ARE OUT THERE, THOSE ARE VIABLE CHOICES AND THOSE ARE
11:36AM 16 CHOICES THAT PEOPLE MADE IN THIS PARTICULAR INDUSTRY.

11:36AM 17 NOW WE ARE CERTAINLY NOT CLAIMING AS AN ELEMENT, RIGHT,
11:36AM 18 THAT OH, THE FACT THAT WE PICKED THAT, YOU KNOW, THAT THAT
11:36AM 19 SOMEHOW IS COPYRIGHTABLE, THESE THINGS EXISTED TO US,
11:36AM 20 YOUR HONOR IS FAMILIAR WITH THAT, THAT IS THE POINT, BUT THAT
11:37AM 21 BACKGROUND I THINK IS IMPORTANT TO RECOGNIZE THAT THERE ARE A
11:37AM 22 LOT OF CHOICES THAT GO INTO THIS THING AND IT'S NOT SIMPLY A
11:37AM 23 SITUATION WHERE AM YOU'RE IN THIS INDUSTRY, SO IT'S DICTATED
11:37AM 24 THAT YOU HAVE TO DO THIS. AND THAT, I THINK, IS AN IMPORTANT
11:37AM 25 THING.

11:37AM 1 SO LET ME JUST PULL OUT, THIS IS FOR DESCRIPTION, SOME OF
11:37AM 2 THESE MULTIWORD COMMAND EXPRESSIONS. THIS IS ONE THAT'S
11:37AM 3 ASSERTED IN THE CASE. THIS IS SPANNING-TREE PORTFAST BDU
11:37AM 4 FILTER DEFAULT.

11:37AM 5 AND I'M NOT GOING THROUGH EACH OF THESE INDIVIDUALLY, I'M
11:37AM 6 USING THIS AS AN EXAMPLE, YOUR HONOR, ON THE CHOICES AND THE
11:37AM 7 CREATIVITY AND THE ORIGINALITY THAT GOES INTO THESE THINGS.

11:37AM 8 SO IF I GO TO SLIDE 4, WE WILL SEE HERE, AND WHAT I HAVE
11:37AM 9 EXCERPTED IS THIS COMES FROM DR. BLACK'S REPORT, YOU WILL
11:37AM 10 REMEMBER WHEN WE TALKED IN CHAMBERS FRIDAY, HE SAID YOU DID
11:37AM 11 THREE THINGS, THE BROWN ONES ARE THE LEGACY COMMAND TERM,
11:38AM 12 MEANING IT'S IN SOME PRE-EXISTING OPERATING SYSTEM, MAYBE NOT
11:38AM 13 INDUSTRY STANDARD MAYBE NOT COMMON INDUSTRY TERM BUT IT'S IN A
11:38AM 14 PREEXISTING ONE.

11:38AM 15 THEN THERE'S THIS IDEA OF THE INDUSTRY STANDARD TERM. AND
11:38AM 16 THAT'S WORD-BY-WORD. THAT'S WHAT HE WENT THROUGH. YOU CAN SEE
11:38AM 17 ON THE COLOR CODING.

11:38AM 18 SO FOR EXAMPLE, IN THIS PARTICULAR ONE HE'S GOT GREEN ON
11:38AM 19 SPANNING-TREE. SO DR. BLACK'S OPINION, RIGHT, THAT
11:38AM 20 SPANNING-TREE, THAT'S AN INDUSTRY STANDARD TERM.

11:38AM 21 THE COURT: PRE-EXISTING CISCO.

11:38AM 22 MR. NELSON: CORRECT.

11:38AM 23 THE COURT: OKAY. THAT'S IMPORTANT HERE.

11:38AM 24 MR. NELSON: IT IS EXACTLY IMPORTANT, AND I SHOULD
11:38AM 25 MAKE THAT CLEAR THAT WHEN I'M TALKING ABOUT THAT, I AM TALKING

11:38AM 1 ABOUT, YOU KNOW, AT THE TIME OF CREATION, BECAUSE WHAT HAPPENED
11:38AM 2 AFTERWARDS --

11:38AM 3 THE COURT: AND WE ARE LOOKING ONLY AT THE TIME OF
11:38AM 4 CREATION HERE.

11:38AM 5 MR. NELSON: RIGHT. EXACTLY.

11:38AM 6 WE ARE TALKING ABOUT THE PROTECTABILITY, WE ARE NOT TALKING
11:38AM 7 ABOUT FAIR USE ISSUES AND THINGS LIKE THAT WHERE SOME OF THAT
11:39AM 8 OTHER STUFF MAY OR MAY NOT CREEP IN.

11:39AM 9 SO THEN THERE'S THE BLUE WITH THE COMMON INDUSTRY TERM,
11:39AM 10 RIGHT. SO I THINK THE DISTINCTION THERE, AS I RECALL, IS IT
11:39AM 11 MIGHT NOT GO TO THE LEVEL OF INDUSTRY STANDARD IN THE SENSE
11:39AM 12 THAT IT'S NOT DEFINED IN SOME IEEE DOCUMENT OR SOMETHING LIKE
11:39AM 13 THAT, BUT SAYING HEY, THIS IS THE KIND OF TERM THAT PEOPLE USE
11:39AM 14 A LOT, RIGHT.

11:39AM 15 YOU CAN SEE EVEN IN THIS COMMAND, TWO OF THE WORDS THEY
11:39AM 16 DON'T CONTEST, THOSE ARE UNIQUE TO CISCO, ALL OF THOSE KINDS OF
11:39AM 17 THINGS. SO THIS ONE WOULD BE PRETTY STRAIGHTFORWARD. SO OF
11:39AM 18 COURSE THAT ISN'T ALWAYS THE CASE, BUT I USE THIS AS AN EXAMPLE
11:39AM 19 BECAUSE I THINK IT'S AN IMPORTANT ONE TO GET INTO, EVEN WITHIN
11:39AM 20 THE CONTEXT OF THE IDEA THAT THERE MIGHT BE INDUSTRY STANDARD
11:39AM 21 TERMINOLOGY OR THERE MAY BE COMMON INDUSTRY TERMS, THERE'S A
11:39AM 22 LOT OF CREATIVITY THAT GOES INTO THIS.

11:39AM 23 AND WHEN I SAY A LOT OF CREATIVITY, YOUR HONOR, LET ME BE
11:39AM 24 CLEAR, I'M TALKING ABOUT THE CDN CONTEXT. I'M NOT TALKING
11:40AM 25 ABOUT THE CONTEXT OF CHAUSER OR ONE OF THOSE GUYS, BECAUSE

11:40AM 1 THAT'S NOT THE STANDARD, THAT'S NOT REALLY HELPFUL TO GO
11:40AM 2 THROUGH THIS, BECAUSE CERTAINLY YOU ARE WRITING THIS FOR AN
11:40AM 3 AUDIENCE, THERE'S NO QUESTION.

11:40AM 4 I'M SITTING HERE AS SOMEBODY WHO IS DESIGNING THIS USER
11:40AM 5 INTERFACE, FOR SOME -- KNOWING WHAT MY AUDIENCE IS, THE PEOPLE
11:40AM 6 THAT ARE GOING TO USE THIS, AND WHAT'S GOING TO MAKE SENSE TO
11:40AM 7 THEM. WHAT DO I THINK IS GOING TO MAKE SENSE TO THEM? WHAT DO
11:40AM 8 I THINK WHEN THEY ARE SITTING THERE BEHIND THESE TERMINALS AND
11:40AM 9 THEIR NETWORK IS GOING DOWN, HOW ARE THEY GOING TO BE ABLE TO
11:40AM 10 GET AT THE INFORMATION THEY NEED TO QUICKLY, EFFICIENTLY,
11:40AM 11 CONFIGURE THESE SWITCHES, DO THESE KINDS OF THINGS.

11:40AM 12 SO IT ISN'T WRITTEN FOR YOU AND ME, NECESSARILY, BUT WITHIN
11:40AM 13 THAT CONTEXT, THERE ARE A LOT OF CHOICES THAT GO INTO THIS.

11:40AM 14 SO, LET'S JUST PULL OUT THIS FIRST ONE, RIGHT.
11:40AM 15 SPANNING-TREE. AND THEN GO TO ONE OF THESE OFFICIAL
11:40AM 16 CERTIFICATION GUIDES. SO THIS IS KIND OF AN INDUSTRY STANDARD
11:41AM 17 TERMINOLOGY THAT DESCRIBES THIS. THIS FUNCTIONALITY OF WHAT
11:41AM 18 THE SPANNING-TREE IS, THE THIRD PRIMARY FEATURE OF LAN SWITCHES
11:41AM 19 IS LOOP PREVENTION AS IMPLEMENTED BY SPANNING-TREE PROTOCOL,
11:41AM 20 RIGHT. STP.

11:41AM 21 SO SURE, YOU KNOW, PEOPLE KNOW WHAT SPANNING TREES ARE, BUT
11:41AM 22 THERE'S A LOT OF WAYS YOU CAN SEE EVEN WITHIN THE CONTEXT OF
11:41AM 23 THIS DOCUMENT LET ALONE OTHER DOCUMENTS OF HOW PEOPLE MIGHT
11:41AM 24 DESCRIBE THAT KIND OF DATA STRUCTURE, WHICH IS WHAT WE ARE
11:41AM 25 TALKING ABOUT HERE.

11:41AM 1 THE COURT: DESCRIBE OR REPRESENT IT.

11:41AM 2 MR. NELSON: EXACTLY.

11:41AM 3 SO WE JUST GAVE SOME EXAMPLES HERE LIKE SPANNING OR TREE OR
11:41AM 4 STP OR SPAN TREE.

11:41AM 5 THE COURT: BUT I DON'T THINK -- YOU ARE GETTING DOWN
11:41AM 6 TO THE WORD-BY-WORD.

11:41AM 7 MR. NELSON: NO, I'M TRYING TO PIECE TOGETHER THE
11:41AM 8 ENTIRETY OF THE COMMAND.

11:41AM 9 THE COURT: UH-HUH.

11:41AM 10 MR. NELSON: AND MAYBE IT'S NOT HELPFUL BECAUSE
11:41AM 11 YOUR HONOR HAS ALREADY PASSED THAT.

11:41AM 12 THE COURT: WELL, YOU KNOW, FIVE WORDS, AND TWO OF
11:41AM 13 THEM ARE UNIQUE TO CISCO.

11:42AM 14 MR. NELSON: YEAH. THIS ONE IS A TOTALLY EASY ONE.

11:42AM 15 THE COURT: IS PRETTY EASY. THE HARD ONE IS WHERE
11:42AM 16 ALL THREE WORDS ARE GREEN.

11:42AM 17 MR. NELSON: WELL, YEAH.

11:42AM 18 THE COURT: THAT'S THE HARDER CASE.

11:42AM 19 MR. NELSON: AGREED.

11:42AM 20 THE COURT: AND DR. BLACK HAS PLENTY OF THOSE.

11:42AM 21 MR. NELSON: RIGHT.

11:42AM 22 HE'S GOT SOME OF THOSE, BUT THAT'S WHY I WAS TRYING TO
11:42AM 23 START ON A GREEN ONE WITH THE IDEA THAT THERE ARE, EVEN WITHIN
11:42AM 24 THE CONFINES OF THIS IDEA OF INDUSTRY STANDARD, RIGHT, THAT YOU
11:42AM 25 WANT TO EXPRESS THIS WHERE YOU COULD USE DIFFERENT TERMINOLOGY.

11:42AM 1 THIS STP, SPAN TREE, SPAN TREE PROTOCOL, ALL THESE THINGS THAT
11:42AM 2 PEOPLE WOULD RECOGNIZE, YOU KNOW, MEANING WHEN I SAY PEOPLE,
11:42AM 3 PEOPLE IN THE INDUSTRY WOULD RECOGNIZE.

11:42AM 4 SO THERE ARE A NUMBER OF MEANS, WE'VE COME UP WITH SIX OF
11:42AM 5 THOSE HERE. SO IT ISN'T CONFINED TO SAY, AND IT'S NOT CORRECT
11:42AM 6 TO SAY, THAT WELL, BECAUSE THIS IS THE DATA STRUCTURE YOU ARE
11:42AM 7 REFERRING TO, EVERYONE IN THIS INDUSTRY ALWAYS REFERS TO IT IN
11:42AM 8 THIS FASHION, WHICH I THINK IS THE ARGUMENT THAT ARISTA IS
11:43AM 9 MAKING, RIGHT, BUT THE POINT IS AND THE EVIDENCE YOU ARE GOING
11:43AM 10 TO HEAR IS THAT ISN'T THE CASE.

11:43AM 11 THERE IS A LOT OF CHOICES, EVEN WITHIN THE CONTEXT OF
11:43AM 12 TRYING TO DEFINE THAT INDUSTRY STANDARD, FOR LACK OF A BETTER
11:43AM 13 TERM, YOU KNOW I DON'T LIKE THAT TERM VERY MUCH, BUT IT IS WHAT
11:43AM 14 IT IS. THERE ARE WAYS TO EXPRESS THAT.

11:43AM 15 AND THAT IN AND OF ITSELF, EVEN WITH THE WORD CHOICE, THE
11:43AM 16 INDIVIDUAL WORD CHOICE, IT DOES RISE TO THE LEVEL SUFFICIENT
11:43AM 17 SOME CREATIVE SPARK, RIGHT. THERE ARE CHOICES YOU COULD MAKE
11:43AM 18 WITHIN THE CONFINES OF THIS THAT SAY, IT DOESN'T HAVE TO BE
11:43AM 19 THAT, IT COULD BE STP, IT COULD BE THESE OTHER THINGS. AND YOU
11:43AM 20 ARE GOING TO HEAR THAT EVIDENCE. SO I DON'T THINK --

11:43AM 21 THE COURT: I GUESS YOU ARE LOSING ME.

11:43AM 22 WE ARE NOT TALKING ABOUT DE FACTO INDUSTRY STANDARD, THAT'S
11:43AM 23 OFF THE TABLE. WE ARE TALKING ABOUT ACTUAL INDUSTRY STANDARD.
11:43AM 24 AND ONCE THERE'S AN INDUSTRY STANDARD, ISN'T A COMPANY
11:44AM 25 FOOLISH -- I MEAN, IT'S ALMOST PREPOSTEROUS TO THINK A COMPANY

1 WOULD DISREGARD AN INDUSTRY STANDARD AND PICK SOMETHING UNIQUE
2 AND LEAVE ALL THEIR CUSTOMERS IN THE DARK.

3 BECAUSE THAT'S THE WHOLE POINT OF THESE PROGRAMS IS TO
4 ALLOW THE ENGINEERS TO OPERATE THE SYSTEM BASED ON WHAT THEY
5 ALREADY KNOW.

6 MR. NELSON: OKAY. SO A COUPLE OF THINGS TO CLARIFY
7 HERE.

8 SO YOUR UNDERSTANDING OF INDUSTRY STANDARD, WE ARE ON THE
9 SAME PAGE WITH RESPECT TO THAT. BUT REMEMBER, INDUSTRY
10 STANDARDS, THEY ARE DEFINED FOR A PARTICULAR APPLICATION.

11 SO LIKE, IEEE, THEY MAY HAVE AN IEEE 802.11(A)(C), WHICH
12 HAPPENS TO BE A RELATIVELY RECENT WIFI STANDARD THAT WE CALL
13 IT. SO THEY WILL USE TERMINOLOGY IN THAT CONTEXT. AND YOU ARE
14 RIGHT THAT IN THAT PARTICULAR CONTEXT.

15 BUT THAT'S NOT WHAT DR. BLACK WENT THROUGH AND DID. HE
16 DIDN'T FIND HERE'S AN INDUSTRY STANDARD FOR HOW YOU CONFIGURE
17 THESE NETWORK SWITCHES, THESE GIGABIT ETHERNET SWITCHES, WHICH
18 IS A WORD I HAVE TROUBLE SAYING, AND I WILL THROUGHOUT TRIAL.

19 SO IT'S A GOOD THING WE ARE NOT DEFINING THE USER INTERFACE
20 THAT WAY, RIGHT.

21 SO THAT IS AN IMPORTANT DISTINCTION AND AN IMPORTANT POINT
22 TO CLEAR UP FOR YOUR HONOR. BECAUSE I WOULD AGREE IF WE HAD A
23 SITUATION IF THEY CAME IN, THEY BEING ARISTA AND DR. BLACK SAID
24 THERE IS AN INDUSTRY STANDARD THAT GOVERNS THIS SPECIFIC
25 FUNCTIONALITY, THAT MAY RESTRICT A BIT.

11:45AM 1 BUT EVEN BEYOND THAT, WHAT YOU ARE GOING TO FIND IS THAT A
11:45AM 2 LOT OF TIMES CISCO DIDN'T DO THAT, RIGHT. THERE ARE
11:45AM 3 SITUATIONS, AND WE WILL TALK ABOUT SOME OF THOSE, WHERE THERE
11:45AM 4 WAS A WAY WITHIN THE CONTEXT OF THESE SWITCHES THAT PEOPLE USE
11:45AM 5 TERMS TO REFER TO CERTAIN THINGS AND CISCO DIDN'T GO THAT WAY,
11:45AM 6 RIGHT.

11:45AM 7 SHOW INVENTORY IS ONE YOU ARE GOING TO HEAR ABOUT. SO SHOW
11:45AM 8 INVENTORY, YOU -- AND I THINK ABOUT THAT AND YOU THINK OKAY,
11:46AM 9 THAT'S PRETTY STRAIGHTFORWARD. BUT I HAVE SLIDES ON THIS, BUT
11:46AM 10 I CAN JUST EXPLAIN IT BECAUSE WE'VE GOT TIME AND IF I NEED TO
11:46AM 11 COME BACK AND SHOW YOU THOSE THINGS I CAN CERTAINLY DO THAT.

11:46AM 12 BUT WHAT YOU WILL HEAR FROM THE CISCO WITNESSES ON THAT,
11:46AM 13 THAT ACTUALLY IS TOTALLY CONTRARY TO HOW THE INDUSTRY WENT,
11:46AM 14 RIGHT. THEY ACTUALLY REFERRED TO THAT KIND OF -- THOSE
11:46AM 15 COMPONENTS WITHIN THE SWITCHES AS MODULES, RIGHT.

11:46AM 16 AND SO IF YOU WERE GOING TO DO IT, THAT'S WHAT YOU WOULD
11:46AM 17 USE. INVENTORY IS USED FOR SOMETHING ELSE. SO THAT
11:46AM 18 TERMINOLOGY, IT'S ACTUALLY KIND OF A SILLY THING, RIGHT.

11:46AM 19 AND IF YOU ARE TALKING ABOUT IT FROM THE STANDPOINT OF,
11:46AM 20 MAYBE SILLY IS NOT THE RIGHT WORD, I'M USING ARISTA'S WORD HOW
11:46AM 21 THEY DESCRIBE THESE THINGS, IT'S COUNTER INTUITIVE. AND THAT
11:46AM 22 RIGHT THERE TO ME, THAT'S A CREATIVE SPARK.

11:46AM 23 THAT'S SOMETHING THAT'S UNIQUE TO CISCO. SO THAT WHEN
11:46AM 24 CISCO WENT OUT TO TRAIN --

11:47AM 25 THE COURT: WELL, BUT LET'S JUST BE CAREFUL HERE.

11:47AM 1 I CAN'T JUST LET ALL 500 OF THESE, I WILL CALL THEM
11:47AM 2 PHRASES, YOU CAN CALL THEM STRINGS, WHATEVER, PASS THROUGH AT
11:47AM 3 THIS TIME JURY.

11:47AM 4 YOU KNOW, I HAVE A JOB HERE, AND YOU'VE DONE PART OF IT FOR
11:47AM 5 ME BECAUSE YOU'VE TAKEN SOME THINGS OFF THE TABLE. AND SO I
11:47AM 6 APPRECIATE THAT.

11:47AM 7 I MEAN, ON THE BASIC IDEA EXPRESSION DICHOTOMY, I THINK YOU
11:47AM 8 HAVE DONE, AS WE GOT TO THE END OF THIS I THINK YOU'VE TAKEN
11:47AM 9 MUCH OF WHAT ARISTA WAS ASKING ME TO TAKE OUT OF THE CASE,
11:47AM 10 YOU'VE TAKEN IT OUT YOURSELVES AND THAT'S GREAT. WE GET MORE
11:47AM 11 INTO THE FUNCTIONALITY, MERGER, SCENES A FAIRE THAT WILL TAKE
11:47AM 12 OUT PERHAPS SOME OTHER THINGS, PERHAPS NOT, BUT I'M NOT DOING
11:47AM 13 THAT TODAY.

11:47AM 14 SO I'M REALLY LOOKING AT THIS, AND IF YOU ARE GOING TO GO
11:47AM 15 THROUGH, AND I ASKED YOU TO AND I APPRECIATE IT, OF EXPLAINING
11:47AM 16 EACH ONE OF THESE TO ME, WE ARE INTO A FACTUAL THING. AND YOU
11:47AM 17 WOULD BASICALLY BE TELLING ME THAT EVERY TWO-WORD COMBINATION
11:47AM 18 HAS SOME CREATIVE SPARK THAT THE JURY OUGHT TO BE ABLE TO SEE.

11:48AM 19 SO I SHOULD FILTER OUT NOTHING, WHICH I KNOW YOU'VE ARGUED
11:48AM 20 YOU SAID YOU DID THE FILTERING AND I'M GOOD TO GO. BUT YOU
11:48AM 21 WOULDN'T BE A GOOD ADVOCATE TO YOUR CLIENT IF YOU ACTUALLY HAD
11:48AM 22 DONE MY JOB FOR ME YOU ARE DOING YOUR CLIENT'S JOB.

11:48AM 23 MR. NELSON: NO, I UNDERSTAND THAT, YOUR HONOR. AND
11:48AM 24 I THINK THAT'S A FAIR POINT.

11:48AM 25 SO THERE CERTAINLY ARE GOING TO BE INSTRUCTIONS THAT YOU

DO, GUIDELINES AND SOME OF THOSE WE TALKED ABOUT AND WE WANT TO BE CLEAR ON WHAT THOSE THINGS ARE.

SO I AGREE THAT EVEN IF WE TOOK THIS, YOU KNOW, THE EXAMPLE, RIGHT, AND WE NEED TO BE CLEAR THAT WE DIDN'T INVENT THIS WORK, RIGHT, SO WE ARE NOT CLAIMING COPYRIGHT PROTECTION ON THAT, AND THAT'S ONE OF THE THINGS THAT THEY, THEY BEING ARISTA, WAS CONCERNED ABOUT BECAUSE FROM A LAY JUROR STANDPOINT, SOME OF THESE WORDS MAY LOOK WEIRD OR, YOU KNOW, THEY MAY LOOK UNIQUE.

BUT THEY WANT TO BE ABLE TO SAY, WELL THEY ARE NOT REALLY BECAUSE THEY PRE-EXISTED. SO THEY DIDN'T INVENT THAT WORD. I DON'T HAVE ANY PROBLEM WITH THAT BECAUSE THAT'S NOT WHAT I'M ARGUING AT ALL.

BUT THE, I THINK ULTIMATELY WHAT WE ARE GOING TO BE TALKING ABOUT, AND YOU ARE RIGHT WE ARE NOT GOING TO BE GOING THROUGH, I HAVE 22 HOURS TO PUT ON AN ENTIRE CASE, AND HOPEFULLY IT'S SOMEWHAT INTERESTING.

IF I SPENT ALL 22 HOURS GOING THROUGH EACH COMMAND ONE BY ONE, THAT WOULDN'T BE SO GOOD. I'M NOT GOING TO DO THAT. I SUSPECT ARISTA IS NOT GOING TO DO THAT. THERE CERTAINLY WILL BE SOME ARGUMENT ON EXAMPLES.

I MEAN, I'M SURE THERE ARE PLENTY OF THE COMMANDS THAT THEY WON'T EVEN, THEY WON'T EVEN ARGUE TO THE JURY. I'M TALKING ABOUT THE ORIGINALITY STANDPOINT. THEY ARE NOT EVEN GOING TO ARGUE IT. THERE ARE SOME THAT I MAY CHOOSE NOT TO ARGUE THAT

11:49AM 1 THEY MAY USE AS EXAMPLES. SHOW INVENTORY MIGHT BE ONE OF THEM,
11:49AM 2 RIGHT. AND MY RESPONSE MAY BE EXACTLY WHAT I TOLD YOUR HONOR.
11:49AM 3 I AGREE THAT'S A FACTUAL QUESTION.

11:49AM 4 SO I THINK IT'S TRUE, WE ARE NOT GOING THROUGH AND CROSSING
11:50AM 5 OUT INDIVIDUAL COMMANDS ONE BY ONE. YOU ARE PROVIDING THE
11:50AM 6 GUIDELINES, AND IT MAY BE THAT THEY CHOOSE FROM AN EVIDENTIARY
11:50AM 7 STANDPOINT THAT I WANT TO MAKE THIS ARGUMENT TO THE JURY ON
11:50AM 8 ORIGINALITY AND YOUR HONOR WILL INSTRUCT FURTHER AT THE END OF
11:50AM 9 THE CASE WHAT THOSE ARE, AND THE JURY WILL APPLY THOSE THINGS.
11:50AM 10 JUST LIKE WE DO OFTEN TIMES IN ANY CASE, THAT'S WHAT THE
11:50AM 11 INSTRUCTIONS ARE --

11:50AM 12 THE COURT: MY ANALYTIC DISSECTION ULTIMATELY WILL BE
11:50AM 13 AT A FAIRLY HIGH LEVEL IN CATEGORIES AND DESCRIPTIONS OF THINGS
11:50AM 14 THAT ARE NOT SUBJECT TO PROTECTION, AS OPPOSED TO THE FOLLOWING
11:50AM 15 LINES ARE PROTECTABLE AND THE FOLLOWING ARE NOT.

11:50AM 16 MR. NELSON: EXACTLY.

11:50AM 17 AND I AGREE WITH YOU THERE BECAUSE I THINK IT WOULD BE A
11:50AM 18 COMPLETELY UNWIELDY INSTRUCTION TO TRY TO DO IT DIFFERENTLY AND
11:50AM 19 IT PROBABLY WOULDN'T REALLY SERVE A PURPOSE.

11:50AM 20 SO THE -- BUT WITHIN THAT CONTEXT, TO THE EXTENT YOUR HONOR
11:51AM 21 KEEPS USING THE CLOCK SET EXAMPLE, RIGHT --

11:51AM 22 THE COURT: I PICKED ONE OUT I UNDERSTOOD.

11:51AM 23 MR. NELSON: WE OBVIOUSLY DO THE SAME THING.

11:51AM 24 SO THE CLOCK SET EXAMPLE, I THINK, LET ME ASK YOUR HONOR A
11:51AM 25 QUESTION IF I MAY BE SO BOLD, ARE YOU THINKING THAT FROM THE

11:51AM 1 STANDPOINT OF HEY, I WANT TO FILTER THAT ONE OUT, I DON'T WANT
11:51AM 2 YOU ARGUING THAT ONE TO THE JURY, RIGHT. SO NOW YOU ARE 506 TO
11:51AM 3 505? OR DO YOU WANT THE CONTEXT OF WHY, EVEN THAT, THERE IS
11:51AM 4 SOME FACTUAL QUESTION AS TO ORIGINALITY?

11:51AM 5 THE COURT: SO I GUESS WHEN I TOOK A LOOK AT THIS, IT
11:51AM 6 WAS VERY CLEAR TO ME THAT SOME OF THE INITIAL WORDS, AND I'M
11:51AM 7 LOOKING AT WHETHER IT'S BANNER, ALTHOUGH THERE ARE ONLY A
11:51AM 8 COUPLE, OR CLEAR, OR IP OR SHOW, THEY ARE VERY STANDARD, AND IF
11:52AM 9 THERE'S ONLY ONE WORD AFTER THAT, IP HOST, ARE THERE OF THE
11:52AM 10 TWO-WORD PHRASES REALLY PROTECTABLE?

11:52AM 11 I MEAN, I KNOW ARISTA IS ASKING ME JUST ON THE NUMBER, TO
11:52AM 12 EXCLUDE THEM. SO I PICKED CLOCK SET, AND THERE ARE OTHERS THAT
11:52AM 13 ARE GOING TO BE AS EQUALLY OR SHOW CLOCK, AS EXAMPLES, BUT THAT
11:52AM 14 WOULD -- THE SAME MIGHT APPLY TO SHOW ARP. EVEN THOUGH I DON'T
11:52AM 15 KNOW WHAT ARP STANDS FOR.

11:52AM 16 MR. NELSON: SO THE ANSWER TO YOUR QUESTION IS YES.
11:52AM 17 THE FIRST QUESTION IS YES. WHICH ARE ANY OF THOSE PROTECTABLE?
11:52AM 18 AND THEY ARE.

11:52AM 19 I MEAN, CERTAINLY THERE ARE GUIDELINES THAT ARE GOING TO
11:52AM 20 GIVE AND THERE WILL BE SOME ARGUMENT ABOUT ORIGINALITY THERE.
11:53AM 21 AND FRANKLY, IT MAY TURN OUT THAT BY ME TRYING TO MAKE THAT
11:53AM 22 ARGUMENT IT'S A BAD IDEA BECAUSE THE JURY LOOKS AT IT AND SAYS,
11:53AM 23 WELL, I DON'T THINK UNDER THE JUDGE'S GUIDELINES THESE ARE, SO
11:53AM 24 THEY GET THE IMPRESSION THAT THERE'S A WHOLE BUNCH OF STUFF IN
11:53AM 25 THERE THAT WE ARE SPENDING TIME ON THAT'S NOT PROTECTABLE.

11:53AM 1 I AGREE WITH THAT.

11:53AM 2 BUT THERE ARE THE TWO-WORD COMMAND. SO FOR EXAMPLE, YOU
11:53AM 3 TALKED ABOUT SHIP, RIGHT. THERE ARE AND YOU WILL HEAR EVIDENCE
11:53AM 4 ON THIS, THERE ARE MANY WAYS THAT YOU COULD, AND OTHER SWITCH
11:53AM 5 MANUFACTURES DO THIS, THAT YOU COULD CALL FOR THAT
11:53AM 6 FUNCTIONALITY.

11:53AM 7 SO IN THE CISCO SYSTEM THEY DECIDED TO TRY TO USE THAT
11:53AM 8 TERMINOLOGY WHEN THEY WANTED TO INTERROGATE THE SWITCH TO GIVE
11:53AM 9 BACK CERTAIN INFORMATION, RIGHT. MEANING, TELL ME THIS, SHOW
11:53AM 10 ME THAT, RIGHT. THERE ARE OTHER TERMINOLOGIES THAT ARE USED,
11:53AM 11 RIGHT, THAT YOU CAN DISPLAY, THAT'S ONE THAT'S USED, I KNOW BY
11:54AM 12 OTHER SWITCH MANUFACTURERS IN THE INDUSTRY.

11:54AM 13 SO THERE ARE CHOICES THAT WENT INTO EVEN WITH THAT, RIGHT.

11:54AM 14 SO IT ISN'T JUST THE FACT THAT THAT WORD STANDING ALONE,
11:54AM 15 THAT'S NOT WHAT WE ARE TALKING ABOUT

11:54AM 16 THE COURT: MR. NELSON, THIS ARGUMENT TELLS ME THAT
11:54AM 17 MY JOB IS DONE ON ANALYTIC DISSECTION, I WILL JUST SEND IT ALL
11:54AM 18 TO THE JURY.

11:54AM 19 THIS ISN'T HELPFUL TO ME. YOU ARE NOT PAINTING FOR ME THE
11:54AM 20 PICTURE OF ANY ORGANIZED WAY FOR ME TO GET AT THIS, NOT AT ALL.

11:54AM 21 MR. NELSON: WELL, ACTUALLY, I THINK --

11:54AM 22 THE COURT: THAT'S, FRANKLY, MY ENORMOUS FRUSTRATION
11:54AM 23 ABOUT THE WAY -- THAT'S WHY I GUESS I ASKED YOU TO BRIEF IT
11:54AM 24 THREE DIFFERENT TIMES BECAUSE I STILL DON'T KNOW WHAT YOU ARE
11:54AM 25 ASKING ME TO DO EXCEPT TO TRUST YOU AND LET IT ALL GO TO THE

11:54AM 1 JURY.

11:54AM 2 MR. NELSON: NO, THAT'S NOT WHAT I'M ASKING YOU TO
11:54AM 3 DO, RIGHT.

11:54AM 4 AND I HAVE PREPARED THIS AND I CAN GO THROUGH ALL OF THESE
11:54AM 5 THINGS IN ORDER TO SHOW YOU EXACTLY THE QUESTION YOUR HONOR IS
11:54AM 6 ASKING, RIGHT.

11:54AM 7 THE COURT: OKAY.

11:54AM 8 MR. NELSON: SO IF I GO BACK TO SLIDE 4, ACTUALLY I
11:55AM 9 WAS ON SLIDE FIVE, AND THERE I'VE EXPLAINED TO YOU THAT WITH
11:55AM 10 RESPECT TO THE SPANNING-TREE, THERE ARE NUMEROUS CHOICES THAT
11:55AM 11 WENT INTO THAT.

11:55AM 12 AND JUST TO BE CLEAR HERE, YOUR HONOR, I'M NOT ARGUING THIS
11:55AM 13 AT THE INDIVIDUAL WORD LEVEL, I'M SHOWING YOU THE CREATIVITY OF
11:55AM 14 THE OVER ALL CONSTRUCTION OF THE OF THE COMMAND.

11:55AM 15 IF I GO TO SLIDE 6, THE NEXT ONE, WE HAVE PORTFAST, AND
11:55AM 16 HERE'S A DESCRIPTION OF WHAT PORTFAST IS. ENABLES PORTFAST
11:55AM 17 MODE WHETHER THE INTERFACE IS IMMEDIATELY PUT INTO THE
11:55AM 18 FORWARDING STATE UPON LINK UP WITHOUT WAITING FOR THE TIMER TO
11:55AM 19 EXPIRE.

11:55AM 20 SO IN OTHER WORDS, THAT'S THE FUNCTIONALITY THAT'S BEING
11:55AM 21 DESCRIBED THAT YOU ARE TRYING TO IMPLEMENT.

11:55AM 22 NOW PORTFAST HAPPENS TO BE A WORD THAT CISCO MADE UP. BUT,
11:55AM 23 YOU KNOW, THERE ARE, YOU CAN SEE FROM THAT FUNCTIONALITY WHEN
11:55AM 24 YOU DESCRIBE IT, THERE ARE A NUMBER OF OTHER CHOICES THAT COULD
11:55AM 25 HAVE BEEN MADE. AND WE PICKED SIX HERE THAT KIND OF COME FROM

11:55AM 1 THIS DEFINITION, THAT WOULD INDICATE TO ONE OF THESE NETWORK
11:56AM 2 ENGINEERS, HEY, THAT'S THE FUNCTIONALITY YOU HAVE.

11:56AM 3 AND IF I KEEP GOING FORWARD, I DON'T NEED TO MAKE THE POINT
11:56AM 4 TO SHOW YOU, WITH THE BPDU FILTER, THERE'S ANOTHER COMMAND THAT
11:56AM 5 BRANCHES OFF OF PORTFAST THAT'S BPDU GUARD THAT'S THE SAME
11:56AM 6 THING. BASED UPON THE DEFINITION, AGAIN, THIS IS ANOTHER WORD
11:56AM 7 THAT CISCO MADE UP, BUT BASED UPON THAT DEFINITION, YOU CAN
11:56AM 8 HAVE A NUMBER OF TERMS THAT WOULD INDICATE TO SOMEONE, AGAIN
11:56AM 9 AFTER TRAINING BECAUSE CISCO SPENT A LOT OF MONEY TRAINING
11:56AM 10 THESE ENGINEERS IN THE CISCO SYSTEM, HOW TO WORK WITH THESE
11:56AM 11 THINGS, AGAIN, A NUMBER OF CHOICES THAT GO INTO THAT.

11:56AM 12 AND THE SAME WITH DEFAULT, RIGHT, BECAUSE IF WE LOOK AT
11:56AM 13 WHAT DEFAULT DOES IN THIS PARTICULAR PORTFAST MODE, IT GLOBALLY
11:56AM 14 ENABLES GLOBALLY BDU FILTERING PORTS THAT ARE IN PORTFAST MODE.

11:57AM 15 SO YOU CAN SEE GLOBAL ENABLE ON, ACTIVE, ENABLED,
11:57AM 16 OPERATIONAL, WORKING. AGAIN, OTHER CHOICES THAT WOULD DESCRIBE
11:57AM 17 THAT FUNCTIONALITY. SO WITH THAT PARTICULAR FOUR-LETTER
11:57AM 18 COMMAND, JUST BY VIRTUE OF WHAT I SHOWED YOU, THESE CHOICES ARE
11:57AM 19 THERE, IF WE GO TO THE NEXT SLIDE, AND I'M NOT GOING TO GO
11:57AM 20 THROUGH ALL OF THESE, YOU COME UP WITH ALMOST 1300 DIFFERENT
11:57AM 21 COMBINATIONS THAT YOU CAN HAVE HERE. AND THAT'S JUST WITH
11:57AM 22 RESPECT TO THE DIFFERENT SELECTION OF WORDS.

11:57AM 23 THE COURT: BUT ARE YOU TELLING ME THAT THE AUTHOR
11:57AM 24 ACTUALLY CONSIDERED THESE DIFFERENT POSSIBILITIES, OR NOW IN
11:57AM 25 2016, AS YOU GET READY FOR TRIAL, YOUR CURRENT EXPERTS ARE

11:57AM 1 SAYING THESE OTHERS COULD HAVE BEEN THOUGHT OF?

11:57AM 2 MR. NELSON: I'M DOING THIS FROM THE CDN PERSPECTIVE,
11:57AM 3 YOUR HONOR. THE TESTIMONY WILL BE THAT THIS IS EXACTLY THE
11:57AM 4 TYPE OF PROCESS THAT THE AUTHORS WENT THROUGH.

11:58AM 5 THE COURT: ALL RIGHT.

11:58AM 6 MR. NELSON: AND THAT THE PARSER POLICE THAT SET OUT
11:58AM 7 GUIDELINES, YOU MIGHT HAVE HEARD THAT TERM A FEW TIMES, FOR
11:58AM 8 THESE THINGS OFFERED UP.

11:58AM 9 SO THIS IS THE EXACT PROCESS. I'M NOT GOING TO GET INTO,
11:58AM 10 WITH THE EXCEPTION OF A FEW EXAMPLES, TO BRING THAT HOME.

11:58AM 11 THE COURT: AND THIS IS A GOOD TEXTBOOK EXAMPLE, I
11:58AM 12 THINK, AND I DO APPRECIATE YOU SELECTING THIS, OF TWO WORDS
11:58AM 13 THAT CISCO ACTUALLY CREATED AND GAVE MEANING TO.

11:58AM 14 MR. NELSON: RIGHT.

11:58AM 15 THE COURT: AND IN THE CONTEXT OF FOUR TOTAL WITH TWO
11:58AM 16 KNOWN, TO STRING TOGETHER THIS CONCEPT.

11:58AM 17 I MEAN, I CAN SEE -- THIS IS A GOOD EXAMPLE OF SOMETHING
11:58AM 18 THAT SHOULD BE PROTECTED IN THE CREATIVE SPARK OF MAKING THIS
11:58AM 19 COMBINATION.

11:58AM 20 MR. NELSON: RIGHT. I THINK THERE'S NO QUESTION
11:58AM 21 ABOUT THAT.

11:58AM 22 THE COURT: AND THAT DOESN'T EVEN SUGGEST WHETHER
11:58AM 23 MERGER OR SCENES A FAIRE IS GOING TO APPLY BECAUSE THAT'S
11:58AM 24 LATER.

11:58AM 25 MR. NELSON: AGREED. AGREED. THAT'S NOT WHAT WE ARE

11:58AM 1 DOING HERE AT THIS PHASE OF THE GAME.

11:58AM 2 BUT USE THAT AS AN ILLUSTRATION TO SHOW THAT THERE ARE,
11:59AM 3 EVEN ONE OF THE AREAS OF CREATIVITY IS THAT THEY SAT DOWN TO
11:59AM 4 DO, AND YOU WILL HEAR THE EVIDENCE ON THIS, IS WHAT WORDS AM I
11:59AM 5 GOING TO CHOOSE TO DESCRIBE THIS FUNCTIONALITY, RIGHT.

11:59AM 6 ANOTHER THING THAT THEY DID, AND I'M WATCHING THE CLOCK --

11:59AM 7 THE COURT: OH, WE CAN GO A COUPLE OF MINUTES.

11:59AM 8 MR. NELSON: AND I'M GOING TO PICK UP, I REALLY WANT
11:59AM 9 TO LAUNCH FROM HERE TO THE HIERARCHIES IN A SECOND, SO I WILL
11:59AM 10 GO A COUPLE MORE MINUTES, THEN WE WILL CUT OFF THERE AND WE
11:59AM 11 WILL PICK UP THERE AFTER LUNCH, IF THAT'S OKAY WITH YOUR HONOR.

11:59AM 12 THE COURT: ABSOLUTELY.

11:59AM 13 MR. NELSON: BECAUSE I KNOW THE HIERARCHIES IS
11:59AM 14 SOMETHING YOU CONCERNED ABOUT, AND PERHAPS I CAN EXPLAIN THOSE
11:59AM 15 A LITTLE BETTER.

11:59AM 16 THE COURT: SO YOU HAVE GIVEN ME THE EXAMPLE WITH
11:59AM 17 THIS ONE PHRASE, AND I GUESS I'M GOING TO REALLY NEED YOU TO BE
11:59AM 18 ABLE TO PERSUADE ME IN ONE OF THE TWO OR THREE-WORD PHRASES,
11:59AM 19 BECAUSE WHAT ARISTA HAS ARGUED IS THAT MAKES UP THE VAST
11:59AM 20 MAJORITY OF THE MULTIWORD COMMAND LINES.

11:59AM 21 MR. NELSON: YEAH, FOR SURE. I HAVE THOSE IN THE
12:00PM 22 PRESENTATION.

12:00PM 23 AND IN FACT, I DID THE SET CLOCK ONE WHICH I CAN DO WHEN WE
12:00PM 24 COME BACK YOUR HONOR, AND THE SHOW INVENTORY AS WELL, BECAUSE
12:00PM 25 THOSE ARE TWO, I THINK, AT A GESTALT LEVEL --

12:00PM 1 THE COURT: I WOULD LIKE TO SEE HOW IT PLAYS OUT.

12:00PM 2 MR. NELSON: EXACTLY.

12:00PM 3 WHETHER THERE REALLY IS SOME FACTUAL ISSUE THERE TO BE
12:00PM 4 DECIDED OR YOU THINK THAT THOSE ARE THINGS THAT YOU SHOULD JUST
12:00PM 5 FILTER OUT AT THIS STAGE. I UNDERSTAND. SO I CAN ADDRESS
12:00PM 6 THOSE DIRECTLY.

12:00PM 7 BUT ONE OF THE THINGS THAT I WANT TO LEAVE YOUR HONOR WITH
12:00PM 8 OR THE THING THAT I WANT TO LEAVE, BECAUSE I KNOW IT'S TIME
12:00PM 9 NOW, IT ISN'T JUST THE SELECTION OF THE WORDS, WHICH IS THE
12:00PM 10 PART THAT I WENT THROUGH THAT'S IMPORTANT, IT'S ACTUALLY THE
12:00PM 11 ORDER OF THE WORDS IS VERY IMPORTANT. HOW YOU DECIDE TO DO
12:00PM 12 THAT.

12:00PM 13 AND I CAN EXPLAIN TO YOU HOW I UNDERSTAND IT AND MAYBE IT
12:00PM 14 WILL HELP YOU. WHEN YOU ARE TRAINING UP AN ENGINEER IN THESE
12:00PM 15 THINGS, THERE'S A LOT OF THINGS TO REMEMBER A NUMBER OF
12:01PM 16 DIFFERENT COMMANDS AND WHAT THE FUNCTIONALITIES ARE AND THE
12:01PM 17 INFORMATION THEY ARE TRYING TO GET OUT. THERE'S ALSO THE IDEA
12:01PM 18 THAT YOU ADD FUNCTIONS DOWN THE ROAD. YOU KNOW, YOU DON'T WANT
12:01PM 19 TO CREATE A STATIC THING, A STATIC USER INTERFACE THAT YOU
12:01PM 20 CAN'T REALLY ADD TO VERY EASILY, BECAUSE THEN IT'S HARD FOR
12:01PM 21 PEOPLE TO LEARN AND HARD TO USE.

12:01PM 22 SO ONE OF THE CHOICES THAT YOU MAKE IS HOW AM I GOING TO
12:01PM 23 ORDER THESE KINDS OF WORDS, BECAUSE IF WE JUST GO BACK TO THIS
12:01PM 24 SPANNING-TREE EXAMPLE.

12:01PM 25 NOW YOU PICK SPANNING-TREE BECAUSE THE PREDOMINANT THING

12:01PM 1 WHEN YOU ARE PERFORMING THESE TYPE OF FUNCTIONS IS WHAT KIND OF
12:01PM 2 DATA STRUCTURE YOU WANT TO OFFER.

12:01PM 3 SO THE ENGINEER WHEN THEY ARE SITTING THERE, THEY ARE LIKE,
12:01PM 4 OKAY, I KNOW WE ARE WORKING WITH SPANNING TREES, SO THAT'S WHAT
12:01PM 5 COMES TO MIND. SO YOU WANT TO ORGANIZE THESE COMMANDS, MEANING
12:01PM 6 WHEN I'M OPERATING ON THESE DATA STRUCTURES, IT'S IMPORTANT FOR
12:01PM 7 ME TO CHOOSE THAT AS THE FIRST WORD AND NOT SOME OTHER.

12:02PM 8 SO IF I JUST STICK WITH THE SAME, AND I HAVE IT UP HERE,
12:02PM 9 LIKE PORTFAST. WE TALKED ABOUT WHAT PORTFAST WAS, THAT WAS A
12:02PM 10 PARTICULAR MODE OF OPERATION.

12:02PM 11 NOW IT COULD BE WHEN YOU GO THROUGH THIS YOU SAY THAT'S THE
12:02PM 12 PREDOMINANT THING, WHEN I'M IN PORTFAST MODE WHAT KIND OF
12:02PM 13 THINGS DO I WANT TO DO.

12:02PM 14 SO THE ENGINEER MAY SAY, THAT'S WHAT PEOPLE ARE REALLY
12:02PM 15 GOING TO THINK ABOUT AND WHEN THEY ARE UNDER PRESSURE, THAT'S
12:02PM 16 GOING TO BE WHAT'S COMING TO MIND. SO I WANT TO ORGANIZE ALL
12:02PM 17 THE THINGS I CAN DO IN PORTFAST MODE UNDER THAT WE CALL THEM
12:02PM 18 HIERARCHIES, BUT THAT BECOMES IMPORTANT.

12:02PM 19 SO I KNOW IT SOUNDS TRIVIAL WHEN YOU SAY THE ORDERS OF THE
12:02PM 20 WORDS IS IMPORTANT, SOMETIMES YOU SAY OKAY, YOU GOT --

12:02PM 21 THE COURT: THAT'S DIFFERENT THAN SYNTAX.

12:02PM 22 MR. NELSON: ACTUALLY, THAT'S A GOOD QUESTION.

12:02PM 23 THE COURT: BECAUSE YOU HAVE DISCLAIMED ANY
12:02PM 24 PROTECTABILITY OF SYNTAX ITSELF.

12:02PM 25 MR. NELSON: WELL, THOSE ARE TWO DIFFERENT THINGS.

12:02PM 1 SO WHEN THEY ARE TALKING ABOUT SYNTAX, THEY ARE TALKING
12:02PM 2 ABOUT IN THAT CONTEXT, TALKING ABOUT THE SPECIFIC PARAMETERS
12:03PM 3 THAT MAY BE PUT IN. SO NOBODY IS CLAIMING THAT.

12:03PM 4 BUT CERTAINLY THE COMMANDS THEMSELVES --

12:03PM 5 THE COURT: THE WORD ORDER IS DIFFERENT THAN -- I
12:03PM 6 JUST WANT TO MAKE SURE YOU ARE TELLING ME THAT.

12:03PM 7 MR. NELSON: BECAUSE WE DON'T WANT TO GET IT CONFUSED
12:03PM 8 WITH THAT TYPE OF SYNTAX BECAUSE YOU ARE RIGHT, NOBODY IS
12:03PM 9 CLAIMING THAT IN TERMS OF THE SPECIFIC PARAMETERS THAT ARE PUT
12:03PM 10 ON AND WHICH ONES AGREE, YOUR HONOR.

12:03PM 11 BUT THIS ORDERING THAT I'M TALKING ABOUT AS WELL AS THE
12:03PM 12 HIERARCHIES WE CLAIM FROM A COMPUTER PROGRAMMING STANDPOINT
12:03PM 13 WOULD TYPICALLY BE REFERRED TO AS SYNTAX. BUT I WOULD RATHER
12:03PM 14 USE A DIFFERENT TERM SO WE DON'T GET CONFUSED.

12:03PM 15 THE COURT: OKAY.

12:03PM 16 MR. NELSON: AND IN FACT, YOU KNOW, IT'S KIND OF LIKE
12:03PM 17 ENGLISH GRAMMAR, THE STRUCTURE OF HOW YOU DECIDE TO DO IT,
12:03PM 18 THAT'S SYNTAX AS WELL.

12:03PM 19 THE COURT: YES.

12:03PM 20 MR. NELSON: BUT WE TRY TO MAYBE USE DIFFERENT TERMS.

12:03PM 21 SO I KNOW WE ARE GETTING LATE AND I CAN GO OR I CAN PICK UP
12:03PM 22 WITH THE HIERARCHIES BECAUSE THAT REALLY DOES LAUNCH --

12:04PM 23 THE COURT: THAT'S FINE, WE CAN GO ON TO HIERARCHIES
12:04PM 24 BUT THEN YOU ARE GOING TO GO BACK TO THE MULTIWORD THAT ARE
12:04PM 25 TWO-WORD.

12:04PM 1 MR. NELSON: I WILL DO THAT AFTER THE LUNCH BREAK
12:04PM 2 BECAUSE THAT WILL TAKE A LITTLE BIT LONGER.

12:04PM 3 THE COURT: THAT'S FINE.

12:04PM 4 ALL RIGHT. AND I GUESS WE HAVE TO KEEP AN EYE ON OUR TIME
12:04PM 5 BECAUSE WE HAVE TO HAVE TOMORROW FOR JURY INSTRUCTIONS.

12:04PM 6 MR. NELSON: UNDERSTOOD, YOUR HONOR.

12:04PM 7 THE COURT: AND SO YOU NEED TO REALLY CONFINE THIS SO
12:04PM 8 THAT I HAVE ENOUGH TIME TO GET THROUGH ALL THE ARGUMENTS ON IT.

12:04PM 9 MR. NELSON: YEAH, NO, AGREED.

12:04PM 10 I UNDERSTAND AND THAT'S -- I APPRECIATE THE FEED BACK
12:04PM 11 BECAUSE I AM TRYING TO BE HELPFUL TO YOUR HONOR. SO DON'T
12:04PM 12 WORRY, IF I'M NOT, JUST TELL ME.

12:04PM 13 THE COURT: OKAY. MR. VAN NEST.

12:04PM 14 MR. VAN NEST: YOUR HONOR, IF WE ARE ABOUT TO BREAK,
12:04PM 15 I JUST WANTED TO, IN LIGHT OF YOUR COMMENTS TO MR. SILBERT, TO
12:04PM 16 APOLOGIZE, I'M THE ONE THAT SAID FILE THE FULL SET, BECAUSE I
12:04PM 17 THOUGHT THAT WAS REQUIRED. SO I WILL TAKE THE HEAT THERE.

12:04PM 18 BUT WHAT I WOULD SUGGEST IS REALLY IN TERMS OF THIS ISSUE
12:04PM 19 WHERE WE ARE TALKING ABOUT WHETHER THE JURY SHOULD GET A HIGHER
12:05PM 20 LEVEL INSTRUCTION UP FRONT, WE DID PREPARE AND I'M PREPARED TO
12:05PM 21 HAND IT UP, NUMBER 12 THAT WE MODIFIED.

12:05PM 22 YOU TOLD US FRIDAY YOU WANT TO GIVE AN INSTRUCTION AND THE
12:05PM 23 JURY SHOULD BE TOLD SOME THINGS STANDING ALONE ARE JUST NOT
12:05PM 24 PROTECTABLE, BUT YOU THOUGHT OURS WAS DETAILED. WE TOOK IT OUT
12:05PM 25 OF THE BRIEFING, AS YOU KNOW, BUT WE PREPARED A MORE HIGH-LEVEL

12:05PM 1 VERSION, AND I'M PREPARED TO HAND IT UP --

12:05PM 2 THE COURT: IS IT DISPUTED?

12:05PM 3 MR. VAN NEST: IT'S STILL DISPUTED.

12:05PM 4 MR. PAK: IT IS, YOUR HONOR.

12:05PM 5 WE DO HAVE A SLIGHTLY DIFFERENT VERSION OF THIS THAT WE
12:05PM 6 WILL HAVE PRINTED OUT SEPARATELY.

12:05PM 7 THE COURT: AND THEN WE WILL LOOK AT THIS TOMORROW
12:05PM 8 THEN.

12:05PM 9 MR. PAK: YES, YOUR HONOR.

12:05PM 10 MR. VAN NEST: BUT I DO THINK IN TERMS OF HOW MUCH
12:05PM 11 YOU HAVE TO HEAR IN THIS AFTERNOON, THIS WILL GUIDE YOU BECAUSE
12:05PM 12 IT'S NOT AS THOUGH -- WE HAVE A FIGHT ABOUT HIERARCHIES AND
12:05PM 13 MODES, THAT'S TRUE. BUT AGAIN, AS MR. SILBERT SAID, WE ARE NOT
12:05PM 14 ASKING YOU TO GO WORD-BY-WORD OR COMMAND-BY-COMMAND AND GO
12:05PM 15 THROUGH ALL 500. WE ARE WANTING SOMETHING MORE GENERAL.

12:05PM 16 THE COURT: OKAY. THANK YOU.

12:06PM 17 AND WE ARE GOING TO BREAK. THERE IS A PRELIMINARY
12:06PM 18 INSTRUCTION THAT IS ACTUALLY NUMBER 95.

12:06PM 19 MR. VAN NEST: RIGHT.

12:06PM 20 THE COURT: SO OF COURSE I GOT TO THAT LATE
12:06PM 21 YESTERDAY, SO I WASN'T IN THE BEST MOOD. HOWEVER, THE CONCEPT
12:06PM 22 IS VERY GOOD, I WILL ONLY GIVE THE INSTRUCTION IF YOU GIVE ME A
12:06PM 23 STIPULATED VERSION OF IT.

12:06PM 24 AND IT'S JUST, THE DISPARITY BETWEEN THE TWO VERSIONS IS
12:06PM 25 SUCH THAT I'M NOT PREPARED TO HAGGLE WITH YOU ON IT, BUT IT'S A

12:06PM 1 PRELIMINARY INSTRUCTION. SO I WANTED TO LET YOU KNOW THAT.

12:06PM 2 THOSE ON YOUR TEAMS WHO ARE WORKING ON THE INSTRUCTIONS,

12:06PM 3 THAT'S, IT'S EITHER IN AS AN AGREED UPON INSTRUCTION OR I'M NOT

12:06PM 4 GIVING IT.

12:06PM 5 MR. VAN NEST: AT ALL?

12:06PM 6 THE COURT: AS A PRELIMINARY. I'M NOT GIVING IT AS A

12:06PM 7 PRELIMINARY INSTRUCTION.

12:06PM 8 MR. VAN NEST: WE HAVE TO AGREE ON IT, BOTH OF US, TO

12:06PM 9 GET IT?

12:06PM 10 THE COURT: THAT'S RIGHT. BECAUSE THE PRESSURE IS ON

12:06PM 11 THE PRELIMINARY INSTRUCTIONS AND WE STILL HAVE TIME TO WORK ON

12:06PM 12 THE OTHERS.

12:06PM 13 MR. PAK: WE WILL MAKE THAT HAPPEN.

12:06PM 14 MR. VAN NEST: BY THE WAY, I THINK ALL THE

12:06PM 15 PRELIMINARIES ARE AGREED EXCEPT THIS 1 AND 95. THOSE ARE THE

12:06PM 16 ONLY TWO PRELIMINARY INSTRUCTIONS THAT ARE DISPUTED.

12:07PM 17 THE COURT: THAT'S GREAT. AND THAT'S WHAT WE WILL

12:07PM 18 WORK ON THAT FIRST THING TOMORROW MORNING, BUT NOW I DON'T HAVE

12:07PM 19 TO WORK ON 95 OR 12.

12:07PM 20 ALL RIGHT. LET'S COME BACK AT TEN PAST 1.

12:07PM 21 MR. NELSON: THANK YOU, YOUR HONOR.

12:07PM 22 (WHEREUPON A RECESS WAS TAKEN.)

01:13PM 23 THE COURT: PLEASE BE SEATED. GOOD AFTERNOON, EVERYONE.

01:13PM 24 OKAY. MR. NELSON, LET'S, IF WE CAN, PICK UP WHERE YOU LEFT

01:13PM 25 OFF.

01:13PM 1 MR. NELSON: OKAY.

01:13PM 2 THE COURT: CAN I ASK YOU ONE QUESTION BEFORE YOU
01:14PM 3 START?

01:14PM 4 MR. NELSON: ABSOLUTELY.

01:14PM 5 THE COURT: WOULD IT BE WRONG FOR ME TO CONSIDER EACH
01:14PM 6 OF THESE MULTIWORD COMMAND LINES LIKE A COMPILATION?

01:14PM 7 MR. NELSON: THAT'S AN INTERESTING QUESTION.

01:14PM 8 I HADN'T REALLY THOUGHT ABOUT IT THAT WAY, AND MAYBE IT'S
01:14PM 9 BECAUSE I DON'T FULLY UNDERSTAND WHAT THEY MEAN EXACTLY BY
01:14PM 10 COMPILATION IN A COPYRIGHT LAW.

01:14PM 11 THE COURT: YEAH, I DON'T EITHER. SO YOU MAKE ME
01:14PM 12 FEEL BETTER BY SAYING THAT.

01:14PM 13 MR. NELSON: I MEAN, I THINK YOU CAN IN A WAY, AND
01:14PM 14 MAYBE, MAYBE YOU ARE LED TO THAT QUESTION BY KIND OF THE WAY I
01:14PM 15 EXPLAINED IT, BECAUSE YOU ARE PUTTING THESE THINGS TOGETHER
01:14PM 16 WITH A FEW THINGS IN MIND, RIGHT.

01:14PM 17 YOU ARE TRYING TO DO SOMETHING THAT'S ONE, CONSISTENT WITH
01:14PM 18 WHAT YOU'VE DONE BEFORE, BECAUSE REMEMBER YOU ARE TEACHING
01:14PM 19 THESE PEOPLE, THE ENGINEERS AND THINGS HOW TO DO THAT, SO IF
01:14PM 20 YOU COME UP WITH SOMETHING THAT'S TOTALLY OFF THE WALL, THEY
01:14PM 21 ARE PROBABLY NOT GOING TO LIKE THAT TOO MUCH, IT'S NOT GOING TO
01:14PM 22 WORK TOO WELL. SO WE GET THAT.

01:14PM 23 THEN YOU WANT SOMETHING THAT MAKES SOME SENSE IN TERMS OF
01:14PM 24 WHAT IT IS YOU ARE TRYING TO DO, WHAT YOU ARE TRYING TO OPERATE
01:15PM 25 ON, AND THOSE KINDS OF THINGS. AND YOU ARE ALSO TRYING TO

01:15PM 1 ORDER THESE THINGS IN AN INTUITIVELY ACCESSIBLE, MAYBE IS THE
01:15PM 2 WORD I'M LOOKING AT, WAY, RIGHT.

01:15PM 3 SO WHEN YOU TAKE THOSE THINGS TOGETHER, I THINK YOU COULD
01:15PM 4 THINK OF THOSE THINGS AS A COMPILATION OF THOSE THINGS, BUT I'M
01:15PM 5 NOT A HUNDRED PERCENT SURE THAT THAT'S WHAT THEY MEAN. HERE'S
01:15PM 6 WHY I THINK IT MIGHT BE A LITTLE BIT DIFFERENT, YOUR HONOR.

01:15PM 7 MY UNDERSTANDING, THE BEST WAY I CAN UNDERSTAND THIS
01:15PM 8 COMPILATION THING IS YOU'VE GOT A WHOLE BUNCH OF FACTS OUT
01:15PM 9 THERE, RIGHT, THINGS THAT EXIST OUT IN THE WORLD, AND WHAT YOU
01:15PM 10 ARE TRYING TO DO IS MAKE A SELECTION OF THOSE THAT'S A CREATIVE
01:15PM 11 SELECTION OF HERE'S HOW I CHOOSE TO PRESENT THESE THINGS.

01:15PM 12 SO IN SOME WAYS YOU COULD DO THAT. LIKE, LET'S SAY, IT'S
01:15PM 13 NOT TRUE BECAUSE I'VE ALREADY SHOWN YOU THAT, BUT LET'S JUST
01:15PM 14 SAY THAT EVERYTHING WE CHOSE WAS INDUSTRY STANDARD

01:16PM 15 THE COURT: WELL, THERE ARE CERTAINLY PHRASES THAT
01:16PM 16 HAVE WORDS THAT WERE INDUSTRY STANDARD.

01:16PM 17 MR. NELSON: ABSOLUTELY.

01:16PM 18 THE COURT: THE ONE YOU SHOWED ME WAS NOT ONE OF
01:16PM 19 THEM.

01:16PM 20 MR. NELSON: NO QUESTION ABOUT THAT, RIGHT.

01:16PM 21 BUT WHAT YOU SELECT AND HOW YOU ORDER THOSE THINGS
01:16PM 22 CERTAINLY CAN BE VIEWED AS A COMPILATION OF THOSE THINGS. I
01:16PM 23 THINK THERE'S NO QUESTION ABOUT THAT.

01:16PM 24 SO WHETHER YOU VIEW IT IN THE CREATIVITY OF THE SELECTION
01:16PM 25 AND THE ORDERING AND THE HIERARCHY, THAT STRUCTURE OR WHETHER

01:16PM 1 YOU VIEW IT AS SOME CREATIVITY IN THE SELECTION OF THOSE
01:16PM 2 THINGS, I THINK YOU CAN LOOK AT THOSE THINGS BOTH WAYS.

01:16PM 3 THE COURT: WELL, BECAUSE I THINK YOU ARE ONLY
01:16PM 4 CLAIMING COPYRIGHT PROTECTION FOR THAT SELECTION AND
01:16PM 5 ARRANGEMENT.

01:16PM 6 MR. NELSON: RIGHT.

01:16PM 7 THE COURT: AND SO MAYBE IT'S NOT A -- IT MAY BE THAT
01:16PM 8 YOUR ENTIRE BUILDING BLOCK OF MULTIWORD COMMANDS, WHICH IS
01:16PM 9 BIGGER THAN THE 508, IS A COMPILATION. AND I DON'T THINK THAT
01:16PM 10 ARISTA IS EVEN ARGUING THAT AT THIS HIGH LEVEL, THAT THERE MAY
01:17PM 11 BE PROTECTABILITY AT THAT HIGH LEVEL.

01:17PM 12 I GUESS WHAT I'M REALLY GETTING AT, AND MAYBE I'M JUMPING
01:17PM 13 THE GUN ON IT BUT, I'M LOOKING AT THE OPS CASE, AND OF COURSE
01:17PM 14 THEY TALK ABOUT THE USER INTERFACE IN THAT CASE.

01:17PM 15 MR. NELSON: RIGHT.

01:17PM 16 THE COURT: AND THEY TALK ABOUT THE COMPILATIONS AND
01:17PM 17 OF COURSE IT GETS TO THE ISSUE OF PROTECTABILITY AND THE SCOPE
01:17PM 18 OF PROTECTION.

01:17PM 19 AND I FEEL LIKE WE ARE MARCHING DOWN THAT ROAD THAT WE GET
01:17PM 20 THROUGH ANALYTIC DISSECTION AND WE GO RIGHT TO SCOPE BECAUSE I
01:17PM 21 DO THINK THEY BUILD, BUT THAT'S REALLY WHAT MOTIVATES MY
01:17PM 22 QUESTION IS THE IS LOOKING AT OPS.

01:17PM 23 MR. NELSON: OKAY. AND IT'S PROBABLY SOMETHING I
01:17PM 24 SHOULD ADDRESS DIRECTLY RATHER THAN TRY TO GO ON MEMORY FROM
01:17PM 25 THAT.

01:17PM 1 THE COURT: OKAY. SURE. LET'S GO BACK TO YOUR
01:17PM 2 PRESENTATION.

01:17PM 3 MR. NELSON: OKAY. SO THEN IF I PICK UP WITH SLIDE
01:17PM 4 20, KIND OF WHERE I LEFT OFF, I WAS TALKING ABOUT THE ORDERING
01:18PM 5 AND LEADING INTO HIERARCHIES, BECAUSE I DON'T WANT YOU TO THINK
01:18PM 6 THAT HERE'S MR. NELSON JUST SITTING UP HERE AND SAYING OH, LOOK
01:18PM 7 AT ALL THESE PERMUTATIONS I CAN MAKE. THAT'S NOT THE PURPOSE
01:18PM 8 OF WHY I'M DOING THIS. IT ACTUALLY DOES MATTER IN THIS CONTEXT
01:18PM 9 AND IT MATTERS QUITE A BIT.

01:18PM 10 SO IF YOU LOOK AT THAT WITH JUST WITH THE EXAMPLE I GAVE,
01:18PM 11 YOU GOT FOUR WORDS, 24 DIFFERENT COMBINATIONS, THAT'S THAT MATH
01:18PM 12 THING I LEARNED WHERE YOU GO 4 TIMES 3 TIMES 2 TIMES 1, AND IT
01:18PM 13 TELLS YOU TO GET 24.

01:18PM 14 SO TAKING THE TWO EXAMPLES THAT I GAVE TOGETHER WERE THE
01:18PM 15 DIFFERENT -- EVEN WITH KNOW THE DIFFERENT INDUSTRY STANDARD
01:18PM 16 CONTEXT, LOOKING AT THE FUNCTIONALITY, THERE'S SIX DIFFERENT
01:18PM 17 COMBINATIONS, YOU HAVE 31,000 AND BETTER COMBINATIONS OF THESE
01:18PM 18 THINGS.

01:18PM 19 NOW THAT'S NOT JUST TO THE GIVE YOU A BIG NUMBER AND SHOW
01:18PM 20 YOU, BUT THAT WAS THE PROCESS THAT PEOPLE WENT THROUGH. I'M
01:18PM 21 NOT SAYING THAT THEY NECESSARILY WERE GOING TO HAVE SOMEBODY
01:18PM 22 TESTIFY AND SAY I LOOKED AT THIS WORD AND I LOOKED AT THAT WORD
01:19PM 23 AND I LOOKED AT THIS WORD, BECAUSE WE COULDN'T. BREAKING DOWN
01:19PM 24 TO THE INDIVIDUAL COMMAND LEVEL WOULD MAKE THIS TRIAL
01:19PM 25 COMPLETELY UNWIELDY, NEITHER ONE OF US WOULD WANT TO BE IN THAT

01:19PM 1 TRIAL, RIGHT. BUT THAT PROCESS IS IMPORTANT.

01:19PM 2 AND THAT'S WHY I KEEP GOING BACK TO THE CDN CASE, BECAUSE
01:19PM 3 IT IS, AND THAT'S WHAT THAT CASE TEACHES US IS I CAN LOOK AT
01:19PM 4 THIS PROCESS AND I CAN HAVE TESTIMONY AS THE PROCESS THAT WAS
01:19PM 5 DONE AND WHAT THE VARIOUS FACTORS THAT WENT INTO IT TO SHOW
01:19PM 6 THAT THERE WAS THAT MINIMUM CREATIVE SPARK FOR ORIGINALITY.
01:19PM 7 AND THAT'S ENOUGH, I DON'T NEED TO GO THROUGH EACH OF THE
01:19PM 8 INDIVIDUAL, IN THAT CASE COIN PRICES, AND SAY YES, THIS
01:19PM 9 PARTICULAR ONE IS CREATIVE, THIS ONE IS NOT.

01:19PM 10 SO THAT'S THE REASON FOR GOING THROUGH THIS.

01:19PM 11 THE COURT: OKAY.

01:19PM 12 MR. NELSON: NOW IF I MOVE FORWARD THEN, AND THIS
01:19PM 13 LEADS RIGHT INTO THE HIERARCHIES, AND I TALKED ABOUT THIS A BIT
01:19PM 14 BEFORE LUNCH, BUT LET ME EXPAND ON IT A BIT.

01:19PM 15 AND THE WAY THESE -- THE WAY WE ILLUSTRATED THE HIERARCHIES
01:19PM 16 WAS WITHIN THE CONTEXT OF WE USED A TEXTUAL REPRESENTATION
01:20PM 17 WITHIN THE CONTEXT OF THE ASSERTED COMMANDS BECAUSE WE DIDN'T
01:20PM 18 WANT TO GET INTO LIKE A FIGHT THAT WE ARE ASSERTING MORE
01:20PM 19 COMMANDS, RIGHT.

01:20PM 20 SO I DON'T WANT TO IMPLY THAT THE HIERARCHIES THAT WE'RE
01:20PM 21 TALKING ABOUT ARE LIMITED TO THE SPECIFIC COMMANDS, BUT THAT'S
01:20PM 22 THE WAY THEY ILLUSTRATE THEM TEXTUALLY WITHOUT GETTING INTO A
01:20PM 23 HEY, WAIT A MINUTE, NOW, CISCO, YOU'RE ADDING 252 COMMANDS
01:20PM 24 BECAUSE OF THE WAY YOU DESCRIBED THESE HIERARCHIES.

01:20PM 25 BUT YOU CAN ALSO EXPRESS THEM IN THIS KIND OF TREE

01:20PM 1 STRUCTURE WHERE YOU KNOW, YOU HAVE THE PARENT, AND THEN YOU
01:20PM 2 MIGHT HAVE THE CHILD BRANCHES AND YOU CAN HAVE GRAND CHILD
01:20PM 3 BRANCHES FROM THOSE.

01:20PM 4 NOW HOW YOU STRUCTURE THAT, AS I SAID, IS IMPORTANT BECAUSE
01:20PM 5 IT'S HOW IT FITS INTO, YOU KNOW, THE OVERALL USER INTERFACE,
01:20PM 6 HOW YOU WANT THIS TO BE DESIGNED SO THAT IT'S ACCESSIBLE AND
01:21PM 7 EFFICIENT FOR THE TRAINED ENGINEERS TO USE.

01:21PM 8 SO IF I MOVE FORWARD IN THE CONTEXT THE INSTRUCTIONS WE ARE
01:21PM 9 DISCUSSING I'M GOING TO SHOW A SPANNING-TREE HIERARCHY. THIS
01:21PM 10 ACTUALLY IS ONE THAT'S IN THE ASSERTED IOS CLI, AND HERE YOU
01:21PM 11 HAVE THE SPANNING-TREE AS BEING --

01:21PM 12 THE COURT: I'M JUST NOT RECALLING THAT PARTICULAR
01:21PM 13 ONE.

01:21PM 14 MR. NELSON: YEAH, I'M NOT SURE IF THAT'S -- I'M
01:21PM 15 ILLUSTRATING THAT WITH A COMMAND, I'M NOT SURE IF THAT'S
01:21PM 16 EXACTLY ONE WE ASSERTED, YOUR HONOR.

01:21PM 17 THE COURT: YOU HAVE MANY MORE THAN I CAN MEMORIZE.

01:21PM 18 MR. NELSON: AND YEAH, UNFORTUNATELY ME AS WELL.

01:21PM 19 BUT WHAT I WANT TO SHOW IS THIS, JUST IN THE CONTEXT OF
01:21PM 20 THOSE COMMANDS THAT I WAS JUST TALKING ABOUT.

01:21PM 21 SO HERE, THE WAY THIS WAS ORGANIZED WAS TO START WITH
01:21PM 22 SPANNING-TREE, THAT'S THE LAST SLIDE IN THE TREE THAT WOULD BE
01:21PM 23 THE PARENT.

01:21PM 24 SO IT'S, YOU KNOW, THINGS THAT WHEN AN ENGINEER IS GOING IN
01:21PM 25 THAT I MIGHT -- INFORMATION I MIGHT BE ABLE TO GET FROM THAT

01:22PM 1 DATA STRUCTURE AND THE VARIOUS THINGS I CAN GET FROM DATA
01:22PM 2 STRUCTURE IS THAT THE NEXT BUILD IN THAT.

01:22PM 3 IF I STICK WITH PORTFAST, THAT'S WHERE THEY DECIDE TO
01:22PM 4 BRANCH IT, BECAUSE THERE'S A FEW THINGS YOU CAN DO WITH
01:22PM 5 PORTFAST, THE BDU FILTER AND THE BDU GUARD, RIGHT. SO YOU SET
01:22PM 6 THIS UP, AND THEY COULD HAVE, AND IF I GO TO THE NEXT SLIDE FOR
01:22PM 7 EXAMPLE, ACTUALLY, LET'S GO TO SLIDE 25.

01:22PM 8 MR. PAK: FOR YOUR HONOR'S BENEFIT, THE SPANNING-TREE
01:22PM 9 HIERARCHIES ARE IN OUR PROTECTABLE FILING ON PAGE 77.

01:22PM 10 THE COURT: 77. THANK YOU.

01:22PM 11 MR. NELSON: THANK YOU, MR. PAK.

01:22PM 12 SO YOU KNOW, YOU COULD AND THIS IS THE WAY THESE ARE -- AND
01:22PM 13 I WANT TO SHOW AN EXAMPLE. THE ONE IS THE RIGHT IS NOT
01:22PM 14 ACTUALLY A HIERARCHY THAT EXISTS, BUT IT'S ILLUSTRATING THE
01:22PM 15 EXAMPLE THAT WE ARE TALKING ABOUT.

01:22PM 16 SO WE KNOW ABOUT THE SHOW HIERARCHY AND THAT'S CERTAINLY
01:23PM 17 ASSERTED IN THE CASE. AND HERE WITHIN THAT SHOW HIERARCHY, WE
01:23PM 18 ACTUALLY HAVE A SPANNING-TREE FUNCTIONALITY, RIGHT.

01:23PM 19 AND THAT'S BECAUSE THAT -- THE DESIGNER DECIDED THAT
01:23PM 20 INTUITIVELY IT MADE SENSE FOR THE FUNCTIONALITY THAT HE WAS
01:23PM 21 TRYING TO EXPOSE THERE, TO PLACE THAT SPANNING-TREE AS THE
01:23PM 22 CHILD, RATHER THAN IF WE GO OVER TO THE RIGHT YOU SEE -- I HAVE
01:23PM 23 JUST KIND OF DONE AN EXPANSION OF THE SPANNING-TREE HIERARCHY
01:23PM 24 THAT WE LOOKED AT IN THE PREVIOUS SLIDE AND SAID, YOU COULD
01:23PM 25 HAVE PUT SHOW DOWN THERE AS JUST ANOTHER THING YOU COULD DO

01:23PM 1 WITH THE SPANNING-TREE. BUT THEY DECIDED THAT THAT DIDN'T,
01:23PM 2 WITHIN THE CONTEXT OF WHAT IT WAS THEY WERE TRYING TO DO, THAT
01:23PM 3 DIDN'T MAKE SENSE.

01:23PM 4 SO HOW YOU STRUCTURE THESE THINGS AND HOW YOU ORDER THE
01:23PM 5 COMMANDS, EXCUSE ME, IT MATTERS FROM A USABILITY STANDPOINT HOW
01:23PM 6 SOMEBODY CAN BE TAUGHT, HOW -- BECAUSE LET'S LOOK AT IT THIS
01:24PM 7 WAY, YOUR HONOR.

01:24PM 8 THE REASON FOR THIS KIND OF STRUCTURE, AT LEAST IN MY OWN
01:24PM 9 MIND THAT MAKES SENSE TO ME, AND THERE'S DOCUMENTATION AND
01:24PM 10 THERE WILL BE EVIDENCE TO SUPPORT THIS, IS TWOFOLD, RIGHT.

01:24PM 11 ONE IS ON THE CREATION SIDE, MEANING WHEN YOU ARE EXPOSING
01:24PM 12 NEW FUNCTIONALITY THAT ARE ADDING TO THESE SWITCHES AND YOU
01:24PM 13 WANT TO EXPAND THE USER INTERFACE, IT PUTS SOME GUIDELINES.
01:24PM 14 AND I USE THE TERM "GUIDELINES" INTENTIONALLY BECAUSE THEY ARE
01:24PM 15 NOT RULES, THEY ARE NOT CONSTRAINTS, THAT'S THE EVIDENCE YOU
01:24PM 16 WILL HEAR, BUT GUIDELINES BECAUSE OTHERWISE YOU END UP WITH
01:24PM 17 RANDOMNESS, PERHAPS. EVERYBODY WANTS TO DO IT DIFFERENTLY AND
01:24PM 18 THEN IT DOESN'T MAKE SENSE AND IT BECOMES, FROM AN EFFICIENCY
01:24PM 19 STANDPOINT, IT BECOMES A MUCH LESS EFFICIENT CLI OR MUCH LESS
01:24PM 20 EFFICIENT USER INTERFACE.

01:24PM 21 IT'S ALSO IMPORTANT FROM THE OTHER SIDE, FROM THE USER
01:24PM 22 STANDPOINT. BECAUSE THERE'S A LOT OF COMMANDS IN HERE.

01:24PM 23 I MEAN, THAT'S PART OF WHAT WE WILL BE ARGUING ABOUT AT
01:25PM 24 TRIAL AND WE ALL KNOW AND THERE'S NO SECRET ABOUT THAT. BUT
01:25PM 25 IT'S HARD, AT LEAST IT'S HARD FOR ME, JUST TO MEMORY RISE ALL

01:25PM 1 THOSE THINGS INDIVIDUALLY.

01:25PM 2 TO SIT THERE, EVEN IF I'M A TRAINED ENGINEER, TO SAY OKAY,
01:25PM 3 THIS PARTICULAR COMMAND DOES THIS, THIS PARTICULAR COMMAND DOES
01:25PM 4 THAT, BUT WHEN I GET MENTAL CUES, LIKE OKAY, I KNOW I'M
01:25PM 5 OPERATING ON A SPANNING-TREE. SO I GO INTO THE, THAT
01:25PM 6 SPANNING-TREE HIERARCHY, AND THEN --

01:25PM 7 THE COURT: SO IF I GO INTO SPANNING-TREE HIERARCHY,
01:25PM 8 I'M THEN GIVEN THIS LIST OF CHOICES TO SELECT AMONG?

01:25PM 9 MR. PAK: YOUR HONOR, JUST TO BE CLEAR, YOU CAN, THIS
01:25PM 10 IS A TEXTUAL INTERFACE SO YOU CAN TYPE IN SPANNING-TREE, BDU,
01:25PM 11 BGP FILTER.

01:25PM 12 REMEMBER, YOUR HONOR, WE TALKED ABOUT HELP DESCRIPTIONS.
01:25PM 13 SO ONE OF THE THINGS YOU CAN DO IN THE SYSTEM THAT'S ALSO
01:25PM 14 ANOTHER ASPECT OF THE CLI USER INTERFACES, IS YOU CAN TYPE
01:25PM 15 SPANNING-TREE, QUESTION MARK. THEN THE SYSTEM WILL LAY OUT FOR
01:25PM 16 YOU THESE OPTIONS IN TERMS OF HERE'S THE NEXT WORD THAT YOU CAN
01:26PM 17 PICK IN THE HIERARCHY.

01:26PM 18 SO THE HIERARCHY IS REPRESENTED IN THE PARSER WHICH
01:26PM 19 RECOGNIZES COMMANDS WHICH IS DESCRIBED ALSO IN THE MANUALS THAT
01:26PM 20 YOU WILL SEE. BUT ALSO IN THE SYSTEM ITSELF, IT'S REFLECTED IN
01:26PM 21 THE HELP DESCRIPTIONS AND HOW IT'S TO ORGANIZE THROUGH THE
01:26PM 22 QUESTION MARK FUNCTION.

01:26PM 23 THE COURT: SORRY, THIS SOUNDS STUPID, BUT WE ARE
01:26PM 24 DEALING WITH THE USER INTERFACE, AND SO I THOUGHT THE
01:26PM 25 HIERARCHIES WERE ACTUALLY A DISPLAY THAT THE ENGINEER WOULD

01:26PM 1 MANIPULATE. BUT YOU ARE SAYING THIS IS UNDERNEATH.

01:26PM 2 MR. PAK: IT'S BOTH, YOUR HONOR. IT'S NOT A DROP
01:26PM 3 DOWN MENU SYSTEM.

01:26PM 4 SO IN A DROP DOWN MENU SYSTEM, YOU WOULD HAVE A HIERARCHY
01:26PM 5 SHOWN ON THE SCREEN ALL THE TIME. THIS IS A TEXT-BASED INPUT
01:26PM 6 SYSTEM. SO WHEN YOU START YOU WITH A MODE AND PROMPT SO THE
01:26PM 7 USER CAN TYPE THESE WORDS IN.

01:26PM 8 THE USER CAN ALSO DO A QUESTION MARK TO SAY, GIVE ME THE
01:26PM 9 NEXT WORD IN THE HIERARCHY FOR THIS PARTICULAR STARTING POINT
01:27PM 10 WORD. OR THERE'S ALSO A COMMAND CALLED PARSE DUMP WHICH IS A
01:27PM 11 COMMAND THAT YOU MIGHT HEAR SOME EVIDENCE ABOUT IN THIS CASE
01:27PM 12 WHERE IF YOU WANT TO KNOW WHAT THE SYSTEM CAN SUPPORT IN TERMS
01:27PM 13 OF ALL THE DIFFERENT COMMANDS --

01:27PM 14 THE COURT: SO I GUESS NOW I'M CONFUSED AS TO WHAT'S
01:27PM 15 THE DIFFERENCE BETWEEN THE HIERARCHIES AND EACH OF THE COMMAND
01:27PM 16 LINES. IS THAT WHERE WE ARE GOING?

01:27PM 17 MR. NELSON: THAT IS WHERE WE ARE GOING.

01:27PM 18 MR. VAN NEST: THAT'S WHERE WE ARE GOING.

01:27PM 19 MR. NELSON: I'M GETTING THERE BOB, DON'T WORRY ABOUT
01:27PM 20 IT.

01:27PM 21 SO THAT'S WHEN I WAS TALKING ABOUT, AND I DON'T WANT TO USE
01:27PM 22 THE TERM SYNTAX, RIGHT, BECAUSE THAT'S -- THE WAY WE'VE KIND OF
01:27PM 23 USED IT IN THE CASE OR MY UNDERSTANDING WAS REFERRING TO, LIKE,
01:27PM 24 THE PARAMETERS AND THE SPECIFIC INPUTS THAT YOU MIGHT HAVE IN A
01:27PM 25 COMMAND BECAUSE YOU ARE SAYING DO THESE THINGS ON A CERTAIN

01:27PM 1 SWITCH OR A CERTAIN PORT OR A CERTAIN NETWORK.

01:27PM 2 THAT'S NOT WHAT WE ARE TALKING ABOUT.

01:27PM 3 BUT THIS, THAT STRUCTURE IN TERMS OF HOW YOU LAY OUT THE
01:27PM 4 COMMANDS, IS PART OF THE USER INTERFACE, RIGHT. IT IS PART OF
01:27PM 5 THE USER INTERFACE. BOTH FOR THE REASONS MR. PAK SUGGESTED, AS
01:28PM 6 WELL AS FOR THESE USABILITY REASONS.

01:28PM 7 SO IT DOES -- IT EXISTS SEPARATE AND APART FROM THE
01:28PM 8 COMMANDS FOR THE EXACT REASONS THAT I DESCRIBED, RIGHT. YOU
01:28PM 9 HAVE THIS OVERALL, AND WE CAN GO THROUGH DOCUMENTATION ON BOTH
01:28PM 10 SIDES, BUT THERE ARE, I DON'T WANT TO TURN THIS INTO AN
01:28PM 11 EVIDENTIARY HEARING ARE FOR YOUR HONOR BUT THERE'S
01:28PM 12 DOCUMENTATIONS ON BOTH SIDES THAT ARE TALKING ABOUT BOTH OF
01:28PM 13 THESE PARTICULAR HIERARCHIES EXISTING WITHIN THE USER INTERFACE
01:28PM 14 AND THAT THEY ARE IMPORTANT TO DECIDE WHAT HIERARCHIES YOU ARE
01:28PM 15 GOING TO USE AND MAINTAIN CONSISTENCY WITH THOSE.

01:28PM 16 THE COURT: SO THIS IS THE CREATOR DECIDING WHICH
01:28PM 17 ONES TO USE, NOT THE USER DECIDING?

01:28PM 18 MR. NELSON: THAT'S CORRECT.

01:28PM 19 THE COURT: OKAY.

01:28PM 20 MR. NELSON: SO IT WOULD BE BECAUSE THE CREATOR IS
01:28PM 21 BEING CONSISTENT WITH THAT HIERARCHICAL ORGANIZATION, BECAUSE I
01:28PM 22 DON'T WANT TO USE THE TERM SYNTAX, THAT MAKES IT EASIER FOR THE
01:28PM 23 USER, RIGHT.

01:28PM 24 SO THE USER UNDERSTANDS THAT THESE TYPES OF COMMANDS I'M
01:29PM 25 WORKING ON A SPANNING-TREE, RIGHT, I CAN GO SPANNING-TREE

01:29PM 1 QUESTION MARK AND I CAN GET WHAT MY OPTIONS ARE FROM THERE
01:29PM 2 RATHER THAN LIKE WE HAVE THIS OTHER ONE, SHOW SPANNING-TREE.
01:29PM 3 YOU HAVE TO REMEMBER THAT, IF YOU WERE TRYING TO THINK, CAN I
01:29PM 4 LOOK AT SOME PARTICULAR INFORMATION FROM THE SPANNING-TREE
01:29PM 5 MIGHT BE HARD IF THE GUY, HE DIDN'T REMEMBER THAT THAT WAS PART
01:29PM 6 OF A DIFFERENT HIERARCHY, RIGHT.

01:29PM 7 SO LET ME -- I DON'T KNOW IF THIS IS GOOD BUT I'M GOING TO
01:29PM 8 GO THERE

01:29PM 9 THE COURT: SO WE ARE LOOKING FOR PROTECTION OF --
01:29PM 10 AND YOU'VE PUT THEM IN BOXES.

01:29PM 11 SO I'M LOOKING AT PAGE 77, AND I'M LOOKING AT YOUR
01:29PM 12 SPANNING-TREE HIERARCHY FOR IOS.

01:29PM 13 MR. NELSON: CORRECT.

01:29PM 14 THE COURT: THAT IS A HIERARCHY, AND YOU ARE SEEKING
01:29PM 15 PROTECTION OF THAT AS ITS PRESENTED TO ME THERE? THAT'S WHAT
01:29PM 16 YOU'VE SAID.

01:29PM 17 MR. NELSON: WHAT WE'VE SAID, IF IT YOU LOOK AT THE
01:30PM 18 LEAD IN TO THAT, THAT'S AN ILLUSTRATION OF WHAT THE HIERARCHY
01:30PM 19 IS.

01:30PM 20 THE COURT: SO THAT'S WHERE YOU LOSE ME, I WAS BEING
01:30PM 21 VERY LITERAL. SO NOW I'M NOT EVEN UNDERSTANDING WHERE THE
01:30PM 22 HIERARCHY EXISTS AND HOW THE USER, IF THIS IS THE USER
01:30PM 23 INTERFACE, HOW IT OPERATES. I'M A STEP BEHIND YOU THERE.

01:30PM 24 MR. NELSON: OKAY.

01:30PM 25 SO THE, LET'S -- AND CAN YOU GIVE ME THAT SPECIFIC LANGUAGE

01:30PM 1 FROM THE USABILITY BRIEF.

01:30PM 2 SO LET ME LOOK AT THIS WAY AND SEE IF I HAVE A BETTER, A
01:30PM 3 MORE REAL-WORLD EXAMPLE.

01:30PM 4 LET'S SAY THAT I HAD A USER INTERFACE OR AN OPERATING
01:30PM 5 SYSTEM THAT I WAS GOING TO USE TO WRITE A WHOLE BUNCH OF
01:30PM 6 DIFFERENT SPORTS VIDEO GAMES.

01:30PM 7 SO I HAD -- I WANTED TO COVER BASEBALL AND HOCKEY AND
01:30PM 8 FOOTBALL AND SOCCER AND VARIOUS OTHER THINGS, RIGHT -- BEAR
01:30PM 9 WITH ME JUST A SECOND

01:31PM 10 THE COURT: I'M WITH YOU.

01:31PM 11 MR. NELSON: SO THERE'S -- WITHIN THE CONTEXT OF
01:31PM 12 THAT, THERE'S COMMONALITY ACROSS SPORTS, RIGHT.

01:31PM 13 SO LIKE, YOU KNOW, AND BASKETBALL I FORGOT. SO SOMETHING
01:31PM 14 LIKE SHOOT, YOU MAY SHOOT, THERE'S A WHOLE -- YOU HAVE THAT IN
01:31PM 15 SOCCER OR A LEAST YOU CAN CALL A KICK A SHOT, RIGHT. AND YOU
01:31PM 16 HAVE THAT IN BASKETBALL FOR SURE. YOU GOT IT IN HOCKEY, THINGS
01:31PM 17 LIKE THAT.

01:31PM 18 SO YOU MIGHT DECIDE THAT THERE'S ENOUGH COMMONALITY WITH
01:31PM 19 RESPECT TO THAT, THAT WHEN YOU ARE ORGANIZING THE STRUCTURE,
01:31PM 20 YOU WANT TO PUT, SO YOU WOULD HAVE SHOOT PUCK, SHOOT BALL,
01:31PM 21 RIGHT. YOU WOULD WANT -- OR SHOOT SOCCER BALLS, SHOOT
01:31PM 22 BASKETBALL, YOU WOULD WANT TO HAVE THEM ORGANIZED THAT WAY
01:31PM 23 BECAUSE IT MAKES MORE SENSE, AS OPPOSED TO ORGANIZING
01:31PM 24 EVERYTHING BY PLAYER.

01:31PM 25 SO YOU MIGHT GO IN AND SAY, OKAY, SOCCER PLAYER, WHAT ARE

01:31PM 1 ALL THE THINGS? A SOCCER PLAYER CAN DRIBBLE. WELL, A
01:31PM 2 BASKETBALL PLAYER CAN DRIBBLE. A SOCCER PLAYER CAN TACKLE,
01:31PM 3 WELL, A FOOTBALL PLAYER CAN TACKLE. SO A BASKETBALL PLAYER CAN
01:32PM 4 DRIBBLE, YES, I MEAN, SOME OF THEM.

01:32PM 5 SO BASKETBALL PLAYER CAN DRIBBLE, RIGHT, BUT A SOCCER
01:32PM 6 PLAYER CAN DRIBBLE TOO. WELL, I DON'T KNOW, I HAD ANOTHER
01:32PM 7 EXAMPLE, I FORGOT WHAT IT WAS.

01:32PM 8 THE COURT: YEAH.

01:32PM 9 MR. NELSON: SO YOU -- THAT'S KIND OF THE SAME THING,
01:32PM 10 RIGHT, SO YOU GO IN AND YOU ARE TRYING TO DECIDE HOW BEST TO
01:32PM 11 ORGANIZE THESE THINGS SO THAT IT PRESENTS ITSELF TO A USER IN
01:32PM 12 AN EFFICIENT AND UNDERSTANDABLE FASHION, RIGHT. AND BOTH FOR
01:32PM 13 WHEN YOU ARE CREATING NEW COMMANDS AND TO -- FOR TEACHABILITY
01:32PM 14 PERSPECTIVE.

01:32PM 15 THE COURT: WHAT I'M GLEANING, FROM WHAT YOU ARE
01:32PM 16 TELLING ME THOUGH, IS THAT THE HIERARCHY IS THE IDEA BEHIND THE
01:32PM 17 EXPRESSION OF THE COMMAND.

01:32PM 18 MR. NELSON: WELL, THE HIERARCHY ITSELF IS AN
01:32PM 19 EXISTING EXPRESSION, RIGHT. AND THAT'S WHAT -- WE ARE NOT
01:32PM 20 CLAIMING THE IDEA OF HIERARCHIES.

01:32PM 21 THE COURT: SO I'M LOOKING FOR THE EXPRESSION. AND
01:33PM 22 I'M SORRY, THAT'S WHAT I'M A LITTLE BIT STUCK ON.

01:33PM 23 IF THE EXPRESSION, YOU ARE TELLING ME THESE ARE ONLY
01:33PM 24 EXEMPLARY. IF PAGE 77, THE SPANNING-TREE EXAMPLE UNDER IOS,
01:33PM 25 THE SPANNING-TREE HIERARCHY, I'VE ASKED YOU ARE YOU CLAIMING

01:33PM 1 PROTECTION OF THIS AS A HIERARCHY, AND I THOUGHT YOU JUST TOLD
01:33PM 2 ME NO, YOU WEREN'T.

01:33PM 3 MR. NELSON: NO, WE ARE CLAIMING --

01:33PM 4 THE COURT: THIS EXISTS IN YOUR USER INTERFACE.

01:33PM 5 MR. NELSON: IT DOES EXIST IN THE USER INTERFACE.
01:33PM 6 THAT'S EXACTLY RIGHT.

01:33PM 7 THE COURT: AND IT'S NOT JUST WHAT IS THE PREDICATE
01:33PM 8 TO THE COMMAND LINE THAT IS PART OF THE 508 OR MORE.

01:33PM 9 MR. NELSON: THAT'S CORRECT. THAT IS CORRECT.

01:33PM 10 IT IS REFLECTIVE OF THE PARTICULAR STRUCTURE, JUST AS I WAS
01:33PM 11 GOING THROUGH THESE THINGS, OF HOW YOU ORGANIZE THESE COMMANDS.

01:33PM 12 SO THAT'S WHY WE USE THE ACCUSED COMMANDS IN ORDER TO
01:33PM 13 ILLUSTRATE THOSE THINGS

01:33PM 14 THE COURT: BUT IT SEEMS TO ME AS THOUGH THERE IS A
01:33PM 15 COMMAND IN THIS IOS THAT IS SPANNING-TREE BP, IT HAS ALL OF
01:34PM 16 THESE WORDS IN IT, I CAN'T EVEN -- THAT IS SPANNING-TREE, BPDU
01:34PM 17 FILTER.

01:34PM 18 MR. NELSON: CORRECT.

01:34PM 19 THE COURT: BUT THAT'S WHAT THE COMMAND LINE IS.

01:34PM 20 MR. NELSON: THOSE -- EXACTLY.

01:34PM 21 BECAUSE THE HIERARCHY, SEE, WHAT WE'VE DONE IS ILLUSTRATED
01:34PM 22 THAT HIERARCHY. THE HIERARCHY IS THE ORGANIZATION, RIGHT. IN
01:34PM 23 OTHER WORDS, THE CHOICE --

01:34PM 24 THE COURT: WELL, I DON'T KNOW THAT YOU CAN COPYRIGHT
01:34PM 25 THE ORGANIZATION IN GENERAL, ISN'T THAT THE IDEA?

01:34PM 1 MR. NELSON: NO, IT'S NOT THE IDEA BECAUSE IT IS A
01:34PM 2 PARTICULAR EXPRESSION.

01:34PM 3 SO IF I GO BACK, LET'S JUST GO BACK TO SLIDE 25 ON THE
01:34PM 4 EXAMPLE. AND YOU CAN SEE THAT HERE -- SO WITH THE SHOW
01:34PM 5 HIERARCHY, THERE ACTUALLY IS A SPANNING-TREE FUNCTIONALITY
01:34PM 6 THAT'S A CHILD OF THE SHOW HIERARCHY.

01:34PM 7 BUT --

01:34PM 8 THE COURT: BUT REALLY EACH OF THESE IS A COMMAND
01:34PM 9 LINE, EACH OF THESE SELECTIONS IS A COMMAND LINE, RIGHT?

01:34PM 10 MR. NELSON: THAT'S CORRECT.

01:35PM 11 THE COURT: OKAY.

01:35PM 12 MR. NELSON: THAT IS CORRECT. BECAUSE THAT'S -- IN
01:35PM 13 TERMS OF WHAT -- SO IN TERMS OF THE ASSERTION THOUGH, THOSE
01:35PM 14 ARE -- THAT'S AN ADDITIONAL THING, RIGHT.

01:35PM 15 SO FOR EXAMPLE, EVEN IF YOU FOUND, SO THAT STRUCTURE, IN
01:35PM 16 TERMS OF THE, SETTING UP THAT SPANNING-TREE HIERARCHY AND
01:35PM 17 PUTTING ALL THESE THINGS, THAT'S PART OF WHAT WAS COPIED HERE,
01:35PM 18 AS OPPOSED TO TRY TO TAKE PARTICULAR COMMANDS AND REORDER.

01:35PM 19 SO WE WOULD SAY, OKAY, I WANT EVERYTHING UNDER PORTFAST.
01:35PM 20 SO I MIGHT USE THE SAME TERMINOLOGY, BUT I DECIDED TO USE A
01:35PM 21 PORTFAST HIERARCHY. THEY DIDN'T DO THAT, THAT'S WHAT WE ARE
01:35PM 22 SAYING. WHAT THEY DID WAS, YOU KNOW, KEPT THAT SAME HIERARCHY
01:36PM 23 FOR THEIR THINGS. AND THERE MAY BE ADDITIONAL COMMANDS THAT
01:36PM 24 THEY ORDER WITHIN THAT PARTICULAR HIERARCHY.

01:36PM 25 BUT SEE, YOUR HONOR, THAT'S AN ADDITIONAL REASON BECAUSE

01:36PM 1 THAT IS A SEPARATE AND DISTINCT EXPRESSION OF -- EXPRESSION,
01:36PM 2 RIGHT, THAT'S SEPARATE AND APART FROM THE COMMANDS THEMSELVES.

01:36PM 3 THE COURT: I GUESS IT'S A PRETTY THIN LINE BETWEEN
01:36PM 4 THE COMMAND ITSELF, AND THIS PARTICULARS TO ME TO BE A FURTHER
01:36PM 5 EXPLANATION OF THE, WHAT YOU CALL THE CREATIVE PROCESS TO
01:36PM 6 CREATE THE COMMAND LINE AS OPPOSED TO SOMETHING THAT IS
01:36PM 7 SEPARATELY PROTECTABLE.

01:36PM 8 AND I'M JUST NOT SEEING ANY -- YOU KNOW, THIS JUST LOOKS TO
01:36PM 9 ME LIKE THIS IS WHAT YOUR ARCHITECTS, YOUR AUTHORS WERE LOOKING
01:36PM 10 AT TO CREATE, IT'S A STEP ALONG THE WAY TO CREATING THE COMMAND
01:36PM 11 LINE AND NOT A SEPARATELY PROTECTABLE ELEMENT.

01:36PM 12 MR. NELSON: WELL, EXCEPT FOR IT IS SOMETHING THAT
01:36PM 13 EXISTS, IT IS SOMETHING THAT EXISTS IN THE USER INTERFACE.

01:37PM 14 AND IT DOES IT FOR THE PURPOSE OF ONE, YOU KNOW, ORDERING
01:37PM 15 THE HELP, FIGURING OUT WHAT'S IN THE HELP COMMANDS AND THE
01:37PM 16 DISPLAYS CAN BE, FIGURING OUT WHAT THE, FROM THE USER
01:37PM 17 STANDPOINT HOW YOU ACCESS CERTAIN INFORMATION IN TERMS OF
01:37PM 18 GETTING AT THE EXPOSED FUNCTIONALITY, WHAT KIND OF PATH YOU
01:37PM 19 TAKE, AND IT HAS TO PREEXIST WHEN YOU THINK ABOUT IT BECAUSE
01:37PM 20 IT'S ALSO GOING TO BE PART OF THE CONSIDERATION THAT'S USED
01:37PM 21 WHEN YOU ADD NEW COMMANDS TO THINGS.

01:37PM 22 SO I UNDERSTAND, YOUR HONOR, AND YOU'RE A HUNDRED PERCENT
01:37PM 23 CORRECT THAT THERE IS AN ASPECT OF IT THAT YOU NEED TO THINK
01:37PM 24 ABOUT IN THE CONTEXT OF THE CREATIVE PROCESS OF -- CREATING THE
01:37PM 25 COMMANDS THEMSELVES, BUT THAT TO ME ANYWAY, THE DIFFERENCE IS

01:37PM 1 THAT THAT PART OF CREATIVE PROCESS IS CHOOSING WHAT HIERARCHY
01:37PM 2 YOU ARE GOING TO PUT THE COMMAND INTO OR WHETHER YOU ARE GOING
01:38PM 3 TO CREATE A NEW HIERARCHY.

01:38PM 4 AND THAT'S SOMETHING -- THEY COULD HAVE USED EXACTLY THE
01:38PM 5 SAME FUNCTIONALITY AND THE SAME, YOU KNOW, CHOICE OF WORDS AND
01:38PM 6 ALL THOSE KINDS OF THINGS, BUT DECIDED TO CREATE DIFFERENT
01:38PM 7 HIERARCHIES IN THE SYSTEM, RIGHT.

01:38PM 8 SO I WOULD SUGGEST THAT THAT'S AN ADDITIONAL REASON WHY
01:38PM 9 SOME OF THE SHORTER COMMANDS THAT WE HAVE WOULD REMAIN BECAUSE
01:38PM 10 THOSE ARE PART OF THE ACCUSED HIERARCHIES IN THE CASE.

01:38PM 11 AND IF I GET TO THE DOCUMENTS -- AND SEAN, CAN YOU POINT ME
01:38PM 12 TO EXACTLY WHERE WE HAVE THE DOCUMENTATION IN THE HIERARCHIES.

01:38PM 13 MR. PAK: YEAH.

01:38PM 14 MR. NELSON: IF I GO TO THE NEXT SLIDE HERE, MAYBE
01:38PM 15 THIS CAN ILLUSTRATE A BIT MORE.

01:38PM 16 SO THESE ARE THE HIERARCHIES THAT EXIST IN THE SYSTEM. SO
01:38PM 17 WE KNOW ABOUT IP AND WE'VE TALKED ABOUT IP QUITE A BIT. AND
01:39PM 18 YOU WILL SEE AND THIS IS AN EXCERPT I HAVE ON SLIDE 26 OF THE
01:39PM 19 IP HIERARCHY. BUT IF I LOOK AT THE "SHOW HIERARCHY," THERE'S
01:39PM 20 ACTUALLY PART OF IT THAT HAS IP FUNCTIONALITY IN THERE.

01:39PM 21 SO IN OTHER WORDS, THERE WAS A CONSCIENCE DECISION MADE NOT
01:39PM 22 TO EXPAND THE IP HIERARCHY TO INCLUDE THIS SHOW FUNCTIONALITY,
01:39PM 23 RIGHT. THAT WAS PLACED IN THE SHOW HIERARCHY.

01:39PM 24 AND SIMILARLY, YOU CAN SEE ONE OF THE THINGS IN THIS
01:39PM 25 EXAMPLE THAT CAN BE SHOWN AS SOMETHING ABOUT VRRP, WHICH IS MY

01:39PM 1 UNDERSTANDING, A PARTICULAR PROTOCOL. BUT RATHER THAN EXPAND
01:39PM 2 THERE, YOU WILL SEE THAT THE DESIGNERS, THEY CREATED A SEPARATE
01:39PM 3 VRRP HIERARCHY AS WELL.

01:39PM 4 SO THEY CHOSE TO, RATHER THAN EXPAND -- BECAUSE THAT'S PART
01:39PM 5 OF WHAT YOU ARE TRYING TO DO IS YOU MAY NOT WANT THE
01:39PM 6 HIERARCHIES TO BE SO LARGE BECAUSE THAT MAKES IT DIFFICULT FROM
01:40PM 7 A USABILITY STANDPOINT AND ALSO, YOU KNOW, LOCKS YOU IN BECAUSE
01:40PM 8 YOU MIGHT ADD ADDITIONAL FUNCTIONALITY DOWN THE ROAD AND THEN
01:40PM 9 SOME OF THE COMMANDS MAY BECOME VERY, VERY COMPLEX.

01:40PM 10 SO YOU SEE HERE THAT YOU CAN HAVE SIMILAR FUNCTIONALITY OR
01:40PM 11 THE SAME FUNCTIONALITY THAT WOULD BE EXPOSED, BUT YOU CHOOSE TO
01:40PM 12 PUT IT IN A DIFFERENT HIERARCHY, AND THEREFORE YOU HAVE A
01:40PM 13 DIFFERENT STRUCTURE TO THE USER INTERFACE.

01:40PM 14 SO THAT'S THE ASPECT OF THE HIERARCHIES THAT WE'RE CLAIMING
01:40PM 15 TO BE SEPARATE AND APART FROM THE COMMANDS THEMSELVES.

01:40PM 16 THE COURT: AND THAT'S WHAT I'M STRUGGLING WITH.

01:40PM 17 BECAUSE IT SEEMS TO ME THAT IF YOU PROVE THAT ARISTA HAS
01:40PM 18 COPIED OR INFRINGED THE, BY COPYING THE HIERARCHIES, THEY
01:40PM 19 NECESSARILY HAVE COPIED THE COMMANDS. YOU CAN'T SEPARATE THEM.
01:40PM 20 YOU DON'T HAVE ONE WITHOUT THE OTHER.

01:40PM 21 AND THAT'S WHERE I'M JUST REALLY STRUGGLING. THAT'S WHY I
01:40PM 22 THINK THE HIERARCHIES ARE MORE ON THE IDEA RATHER THAN
01:41PM 23 EXPRESSION SIDE, OR THE COMMAND IS REALLY JUST THE OUTPUT OF
01:41PM 24 THE HIERARCHY, IT'S NOT SOMETHING DISTINCT.

01:41PM 25 MR. NELSON: WELL, I UNDERSTAND WHAT YOU ARE SAYING,

01:41PM 1 BUT YOU COULD ALSO HAVE A SITUATION -- I MEAN, LET'S SAY, WE'VE
01:41PM 2 ILLUSTRATED IN A SENSE BECAUSE WE CHOSE TO DO THAT, WE DIDN'T
01:41PM 3 WANT TO EXPAND THE CASE AND CREATE THE AMBIGUITY, THAT
01:41PM 4 PARTICULAR COMMANDS ARE NOT -- YOU ARE GOING TO FILTER THOSE,
01:41PM 5 RIGHT, THAT MAY BE THE CASE, I UNDERSTAND THAT.

01:41PM 6 BUT THEY WOULD STILL BE PART OF THE ASSERTED HIERARCHY
01:41PM 7 THAT'S HERE SEPARATE AND APART. SO THAT'S WHY THAT IS
01:41PM 8 DIFFERENT.

01:41PM 9 NOW, WE COULD HAVE INCLUDED A WHOLE BUNCH OF OTHER COMMANDS
01:41PM 10 THAT ARE WITHIN THE HIERARCHY AS ILLUSTRATIVE OF THAT, BUT THAT
01:41PM 11 JUST MAKES THE CASE MORE AND MORE UNWIELDY, SO WE CHOSE NOT TO
01:41PM 12 DO THAT. BUT I DO THINK THAT IT IS A SEPARATE AND DISTINCT
01:41PM 13 THING.

01:41PM 14 AND IF I GO TO SLIDE 72, YOU WILL SEE THIS IS FROM ARISTA'S
01:42PM 15 OWN DOCUMENTATION, THEY HAVE CLI CONVENTIONS AND STYLE
01:42PM 16 GUIDELINES.

01:42PM 17 SO I MEAN, THEY TALK ABOUT THIS INTERNALLY AS BEING
01:42PM 18 SOMETHING HAD THAT EXISTS. USE CONVENTIONAL COMMAND
01:42PM 19 HIERARCHIES, RIGHT. WHEN NAMING A --

01:42PM 20 THE COURT: THEY MAY USE THE SAME IDEA YOU USE,
01:42PM 21 THAT'S REALLY WHAT I'M GETTING AT HERE. AND YOU ARE NOT
01:42PM 22 SEEKING PROTECTION OF THE IDEA OF A HIERARCHY.

01:42PM 23 MR. NELSON: NO, NO. I'M NOT DOING THAT AT ALL. WE
01:42PM 24 ARE NOT DOING THAT. THAT'S WHY WE NAMED AND ILLUSTRATED IT IN
01:42PM 25 THE SENSE OF THE ASSERTED COMMANDS, THE SPECIFIC HIERARCHIES WE

01:42PM 1 ARE CLAIMING.

01:42PM 2 SO YOU ARE RIGHT IN THE TERMS OF THEY LOOK AND MAYBE THAT
01:42PM 3 WAS A MISTAKE ON OUR PART NOT TO EXPAND THE CASE FATHER, BUT
01:42PM 4 THEY LOOK TO BE COEXTENSIVE BECAUSE WE CHOSE TO ILLUSTRATE THE
01:42PM 5 ACCUSED HIERARCHIES WITHIN THE CONTEXT OF THE ASSERTED
01:42PM 6 COMMANDS, RIGHT.

01:42PM 7 BUT JUST TAKING THE EXAMPLE, YOU KNOW, THERE MAY HAVE BEEN
01:43PM 8 ADDITIONAL ONES THAT THEY HAD THAT WERE SINGLE WORD COMMANDS
01:43PM 9 THAT FELL ON THAT HIERARCHY OR OTHER COMMANDS THAT THEY ADDED
01:43PM 10 WITHIN THAT HIERARCHY, SO IT MAINTAINED THE SAME HIERARCHY BUT
01:43PM 11 IT WASN'T A COPIED COMMAND.

01:43PM 12 AND SO RATHER THAN CREATE THAT AMBIGUITY, WE CHOSE TO GO
01:43PM 13 WITH THAT. BUT IF YOUR HONOR FILTERS THINGS OUT, CLEARLY THEY
01:43PM 14 WOULDN'T BE COEXTENSIVE, THEY WOULD BE --

01:43PM 15 THE COURT: SURE, THAT'S TRUE.

01:43PM 16 MR. NELSON: RIGHT.

01:43PM 17 AND SO, I DON'T KNOW IF THAT EXPLAINS TO YOU WHAT WE ARE
01:43PM 18 TALKING ABOUT WITH RESPECT TO THE HIERARCHIES, BUT IF YOU HAVE
01:43PM 19 QUESTIONS, I CAN DEAL WITH IT, BUT I DON'T WANT TO JUST KEEP --

01:43PM 20 THE COURT: OKAY. NO, LET'S GO ON.

01:43PM 21 MR. NELSON: OKAY.

01:43PM 22 SO -- NO, I'M NOT DONE YET, THAT WAS JUST HIERARCHIES.

01:43PM 23 SO YOUR HONOR ASKED THE QUESTIONS, A COUPLE OF QUESTIONS
01:43PM 24 ABOUT SOME OF THESE TWO-WORD COMMANDS.

01:44PM 25 THE COURT: YEAH.

01:44PM 1 MR. NELSON: AND HONESTLY, I WELCOME THIS PROCESS
01:44PM 2 BECAUSE I WANT TO KNOW HOW I'M TRYING MY CASE, RIGHT.

01:44PM 3 THE COURT: SURE.

01:44PM 4 MR. NELSON: I DON'T -- IF YOUR HONOR IS
01:44PM 5 UNCOMFORTABLE WITH SOMETHING OR IF I CAN'T GET YOU THERE WITH
01:44PM 6 THAT, I WANT TO TELL YOU WHAT I THINK MY EVIDENCE IS GOING TO
01:44PM 7 BE AND THEN WE CAN SEE. BECAUSE I DON'T WANT TO TRY A CASE
01:44PM 8 WHERE I'M TELLING THE JURY IN OPENING THERE'S THESE 506
01:44PM 9 COMMANDS AND THEN, YOU KNOW, YOU DECIDE, OKAY, WELL 200 OF THEM
01:44PM 10 ARE GOING AWAY, RIGHT. I WOULD RATHER HAVE AN INDICATION OF
01:44PM 11 THAT BECAUSE THAT HELPS ME.

01:44PM 12 THE COURT: SURE.

01:44PM 13 MR. NELSON: AND I THINK YOUR HONOR WOULD LIKE THAT
01:44PM 14 TOO BECAUSE IT MAKE ITS EASIER FOR THE JURY.

01:44PM 15 SO I WILL TELL YOU WHAT OUR REASONING IS AND DO THE BEST I
01:44PM 16 CAN WITH THAT, BUT I APPRECIATE THE OPPORTUNITY TO DO IT.

01:44PM 17 SO LET ME GO TO SLIDE 27, BECAUSE THIS IS ONE SPECIFICALLY
01:44PM 18 THAT YOU'VE ASKED ABOUT. AND I TOTAL UNDERSTAND THE GESTALT,
01:44PM 19 RIGHT. THERE'S NO QUESTION ABOUT THAT. BUT WE HAVE TO LOOK AT
01:45PM 20 THE CONTEXT AND WHAT THE CHOICES ARE WITHIN THAT.

01:45PM 21 LIKE, SOMEBODY TOLD ME TO BE OR NOT TO BE, YOU KNOW, THAT'S
01:45PM 22 PRETTY SIMPLE, THOSE ARE SIMPLE WORDS, BUT WELL, IT WAS
01:45PM 23 PROTECTABLE AT ONE TIME, SOMEBODY WROTE IT NOW.

01:45PM 24 SO I THINK WE NEED TO GET PAST THAT MAYBE AND LET ME JUST
01:45PM 25 EXPLAIN TO YOU WHERE WE ARE AT ON THAT.

01:45PM 1 SO IF I LOOK AT SLIDE 27, AND THIS IS IN THE CONTEXT OF THE
01:45PM 2 HIERARCHIES MAKE SENSE TOO, SO THERE IS A CLOCK SET, RIGHT, AND
01:45PM 3 THERE'S ACTUALLY A COUPLE WITHIN THAT CLOCK HIERARCHY, THERE'S
01:45PM 4 ALSO CLOCK TIMEZONE. CLOCK SET ACTUALLY DOESN'T DO WHAT YOU
01:45PM 5 THINK -- I WOULD THINK OKAY, IT SETS THE TIME ON THE CLOCK.

01:45PM 6 THE COURT: IT'S NOT EVEN IN THIS HIERARCHY, IS IT?

01:45PM 7 MR. NELSON: WELL, THIS IS A SEPARATE HIERARCHY ON
01:45PM 8 THE RIGHT, THAT'S THE SHOW.

01:45PM 9 THE COURT: OKAY. THAT'S THE "SHOW HIERARCHY."
01:45PM 10 OKAY.

01:45PM 11 MR. NELSON: SO CLOCK SET ACTUALLY WILL DO THE
01:46PM 12 CURRENT MONTH, THE CURRENT YEAR, AND YOU CAN DO THE TIME AS
01:46PM 13 WELL. SO THE FUNCTIONALITY IS THERE. TIMEZONE, OF COURSE THAT
01:46PM 14 ONE WOULD DO, SET THE CURRENT TIMEZONE.

01:46PM 15 BUT -- SO THAT'S THE FUNCTIONALITY THAT'S EXPOSED. BUT YOU
01:46PM 16 CAN SEE, AND THIS GOES BACK TO HOW YOU ORGANIZE THESE THINGS,
01:46PM 17 YOU COULD HAVE DONE SET CLOCK TOO, BECAUSE LET'S SAY YOU WANTED
01:46PM 18 TO CREATE A SET HIERARCHY AND JUST DO EVERYTHING YOU CAN SET IN
01:46PM 19 THE SYSTEM, LET'S PUT THAT UNDER A SET HIERARCHY, SO THERE
01:46PM 20 WOULD BE DIFFERENT STRUCTURE TO THAT PARTICULAR COMMAND. NO
01:46PM 21 QUESTION ABOUT THAT. AND THAT'S ILLUSTRATED HERE IN SHOW.

01:46PM 22 SO WITHIN THE "SHOW HIERARCHY" THERE IS A SHOW CLOCK,
01:46PM 23 RIGHT.

01:46PM 24 SO IT WAS SPECIFICALLY CHOSEN, I'M GOING TO PUT THAT IN AS
01:46PM 25 ONE OF THE THINGS YOU CAN SHOW AS OPPOSED TO PUTTING IT IN THE

01:46PM 1 CLOCK HIERARCHY AND SAYING CLOCK SHOW.

01:47PM 2 SO THOSE ARE CHOICES THAT ARE OUT THERE AND THERE ARE REAL
01:47PM 3 UI DIFFERENCES, RIGHT, IT'S A DIFFERENT SEQUENCE STRUCTURE
01:47PM 4 ORGANIZATION TO THE USER INTERFACE WHEN YOU MAKE THOSE CHOICES.

01:47PM 5 AND I SHOW JUNIPER OVER HERE BECAUSE THEY HAVE, AND YOU'VE
01:47PM 6 HEARD ABOUT THAT DURING THE CASE, THEY HAVE DIFFERENT, WHOLLY
01:47PM 7 DIFFERENT USER INTERFACE. AND COMMANDS THAT THEY HAVE FOR
01:47PM 8 SIMILAR FUNCTIONALITY, THEY ACTUALLY HAVE A SET, YOU KNOW, THEY
01:47PM 9 PUT EVERYTHING UNDER SET AND THEY SAY SET DATE, AND --

01:47PM 10 THE COURT: SO THIS HAS TO DO WITH THE CREATION OF A
01:47PM 11 HIERARCHY, THAT'S THE PROCESS HERE AS TO WHETHER IT'S CLOCK AND
01:47PM 12 THEN THE CLOCK FUNCTION CHOICES, OR WHETHER IT'S SET AND ALL
01:47PM 13 THE SET OPTIONS.

01:47PM 14 MR. NELSON: CORRECT. THAT'S A HIERARCHY ISSUE.

01:47PM 15 THE COURT: OKAY, IT'S NOT A COMMAND --

01:47PM 16 MR. NELSON: WELL, IT'S -- AS YOUR HONOR --

01:48PM 17 THE COURT: BECAUSE THE COMMAND IS THE RESULT OF THE
01:48PM 18 HIERARCHY, THERE'S NOTHING --

01:48PM 19 MR. NELSON: IN THAT CONTEXT WITH RESPECT TO THAT
01:48PM 20 PARTICULAR CHOICE.

01:48PM 21 THE COURT: SO IT SEEMS TO ME THERE'S NOTHING
01:48PM 22 SEPARATELY CREATIVE ABOUT THE COMMAND, IT'S ALL IN THE
01:48PM 23 HIERARCHY CREATION. AND THE COMMANDS JUST ARE PUSHED OUT,
01:48PM 24 THERE'S NOTHING THAT HAPPENS NEW AND APART FROM THE HIERARCHY.

01:48PM 25 MR. NELSON: WELL, YOU ARE TALKING ABOUT THE SHORT

01:48PM 1 COMMANDS?

01:48PM 2 THE COURT: AUTOMATIC OF THEM, ACTUALLY. I MEAN,
01:48PM 3 THAT'S WHERE, BECAUSE IT SEEMS TO ME THAT EVERY COMMAND EXISTS
01:48PM 4 AS PART OF A HIERARCHY.

01:48PM 5 MR. NELSON: ACTUALLY, NO.

01:48PM 6 THE COURT: NO?

01:48PM 7 MR. NELSON: IT WOULD SEEM THAT WAY BECAUSE THAT'S
01:48PM 8 THE WAY WE CHOSE TO ILLUSTRATE THE HIERARCHIES, BUT THEY ARE
01:48PM 9 NOT COEXTENSIVE.

01:48PM 10 WE HAVE PLENTY OF COMMANDS THAT ARE ASSERTED IN THE CASE,
01:48PM 11 AND I CAN GIVE YOU SOME OF THOSE EXAMPLES AND CERTAINLY WITHIN
01:48PM 12 THE UI THAT ARE NOT A PARTICULAR PART OF A HIERARCHY.

01:48PM 13 THE COURT: OKAY.

01:48PM 14 MR. NELSON: THE OTHER THING IS AS YOU TRACE DOWN,
01:48PM 15 YOU WILL SEE FOR EXAMPLE, IF I JUST STICK WITH SLIDE 27, AND I
01:48PM 16 GO FOLLOWING THE "SHOW HIERARCHY," I HAVE SNMP.

01:49PM 17 AND REMEMBER SHOW IS -- THERE'S NOTHING DICTATIVE ABOUT
01:49PM 18 THAT, THERE WILL BE TESTIMONY THAT YOU COULD USE DISPLAY, YOU
01:49PM 19 COULD USE PRINT, THAT WAS -- THERE'S A NUMBER OF THINGS THAT
01:49PM 20 PEOPLE WOULD USE AND THEY WOULD KNOW, YOU KNOW, IN THE INDUSTRY
01:49PM 21 WHAT IT IS THAT YOU ARE TALKING ABOUT, OR AT LEAST GENERALLY.

01:49PM 22 BUT YOU SEE I HAVE SHOW SNMP. AND AGAIN, YOU HAD CHOICES
01:49PM 23 ABOUT SNMP AND WHAT YOU DECIDED TO CALL THAT. BUT THEN THERE'S
01:49PM 24 ALL SORTS OF THINGS OFF OF THAT. AND THOSE ARE ALL DIFFERENT
01:49PM 25 CHOICES THAT WERE MADE.

01:49PM 1 SO THIS HIERARCHY, BECAUSE SNMP, THIS WAS CHOSEN TO PLACE
01:49PM 2 IN THE CHILD OF THE SHOW HIERARCHY, IT DIDN'T DICTATE WHAT THE
01:49PM 3 COMMAND WAS --

01:49PM 4 THE COURT: RIGHT.

01:49PM 5 MR. NELSON: IT MAY BE BECAUSE OF THOSE HIERARCHIES,
01:49PM 6 THAT GIVES YOU SOME ORGANIZATIONAL STRUCTURE, SOME GUIDELINES
01:50PM 7 AS TO HOW IT IS THAT YOU MIGHT STRUCTURE THE COMMAND IN TERMS
01:50PM 8 OF HOW YOU ARE GOING TO PLACE THE DESCRIPTIONS ON WHAT YOU WANT
01:50PM 9 TO CALL THE VARIOUS FUNCTIONALITIES OR ACTIONS OR THINGS YOU
01:50PM 10 ARE OPERATING UPON. WHETHER THERE'S FLEXIBILITY THERE SO IT
01:50PM 11 MAY GIVE GUIDELINES. BUT THE ONE DOESN'T RESULT FROM THE
01:50PM 12 OTHER.

01:50PM 13 I FULLY AGREE THAT THERE'S AN INTERRELATIONSHIP, THERE'S
01:50PM 14 THE INTERRELATIONSHIP BETWEEN ALL THE ELEMENTS OF THIS UI, IT
01:50PM 15 IS A USER INTERFACE, SO EVEN THOUGH WE TALK ABOUT THINGS AS
01:50PM 16 SEPARATE AND DISTINCT ELEMENTS, THEY ALL DO HAVE SOME
01:50PM 17 RELATIONSHIP, THERE'S NO QUESTION ABOUT THAT.

01:50PM 18 THE COURT: OKAY.

01:50PM 19 MR. NELSON: SO YOU CAN SEE WITH JUNIPER FOR SIMILAR
01:50PM 20 FUNCTIONALITY, IT SHOES SOMETHING DIFFERENT, IT SHOWS SET DATE.
01:50PM 21 AND THAT WOULD BE ONE OF THE THINGS YOU COULD GO IN THERE AND
01:50PM 22 YOU COULD SET THE CLOCK.

01:50PM 23 AND JUST TO ILLUSTRATE TOO, YOU WILL SEE WITHIN THIS "SHOW
01:50PM 24 HIERARCHY," THAT WE HAVE, WE HAVE SHOW PTP, WHICH IS A
01:51PM 25 PARTICULAR PROTOCOL. AND THE CLOCK THERE, AS OPPOSED TO SAYING

01:51PM 1 CLOCK, SHOW, PTP, AND JUNIPER FOR DOING THAT, DECIDED TO DO SET
01:51PM 2 DATE NTP.

01:51PM 3 SO THERE ARE OPTIONS AVAILABLE, THERE ARE DIFFERENT WAYS TO
01:51PM 4 DO IT. AND OTHER PEOPLE IN THIS INDUSTRY CHOSE TO DO THAT
01:51PM 5 DIFFERENTLY.

01:51PM 6 NOW YOUR HONOR MAY THINK, OKAY, DESPITE THAT, YOU KNOW, I
01:51PM 7 THINK THAT THIS IS -- THIS IS A TOUGH ONE, RIGHT. AND THAT WAS
01:51PM 8 WHY YOU ASKED ABOUT THAT ONE --

01:51PM 9 THE COURT: I GUESS WHAT WE GET DOWN TO THEN IS THAT
01:51PM 10 BASED ON THESE EXAMPLES, FOR EXAMPLE, IF ARISTA HAD SET CLOCK,
01:51PM 11 AS OPPOSED TO CLOCK SET, THERE WOULD BE NO COPYING.

01:51PM 12 MR. NELSON: CORRECT. AND SEE, THAT'S AN IMPORTANT
01:51PM 13 POINT HERE.

01:51PM 14 THE COURT: THEN OF COURSE WE WERE ALL THE WAY AT
01:51PM 15 THIN PROTECTION HERE BECAUSE IT HAS TO BE VIRTUALLY IDENTICAL.
01:51PM 16 AND THE ORDER YOU ARE TELLING ME IS A CRITICAL PART OF THE
01:51PM 17 CREATIVE PROCESS WHEN THE CHOICE IS MADE.

01:52PM 18 MR. NELSON: CORRECT. YOU WILL HEAR THAT -- YOU WILL
01:52PM 19 HEAR TESTIMONY ON THAT.

01:52PM 20 THE COURT: OKAY.

01:52PM 21 MR. NELSON: WELL, THAT IS TRUE --

01:52PM 22 THE COURT: BECAUSE THAT MAY RESOLVE SOME OF THE
01:52PM 23 ISSUES, THAT GETS US CLOSER TO SOME OF THE OTHER ISSUES THAT
01:52PM 24 NEED TO BE RESOLVED IN THE JURY INSTRUCTIONS.

01:52PM 25 MR. NELSON: I AGREE. I AGREE.

01:52PM 1 AND SEE, THERE'S SOMETHING YOU SAID THIS MORNING THAT I
01:52PM 2 THINK IS RELEVANT TO THIS POINT AND SOMETHING YOUR HONOR JUST
01:52PM 3 SAID, SO WE'RE NOT GOING IN AND SAYING, AND I THINK I DID THIS
01:52PM 4 EARLIER, TALKED ABOUT THIS EARLIER, WE ARE NOT GOING IN AND
01:52PM 5 SAYING OKAY, LIKE THE ONE I SAID BEFORE, IF YOU PUT PORTFAST
01:52PM 6 BEFORE SPANNING-TREE, IT REALLY DOES THE SAME THING, IT LOOKS
01:52PM 7 THE SAME AND THEREFORE YOU ARE STILL INFRINGING, YOU COPIED
01:52PM 8 THAT ELEMENT.

01:52PM 9 I DON'T EVEN KNOW HOW TO USE THAT TERMINOLOGY BECAUSE WE
01:52PM 10 ARE TALKING ABOUT WHAT EVIDENCE I CAN USE TO SHOW INFRINGEMENT.
01:52PM 11 BUT LET'S JUST, YOU KNOW, USE THAT FOR SHORTHAND.

01:52PM 12 THAT'S NOT WHAT WE ARE SAYING. WE ARE NOT SAYING IT HERE.
01:52PM 13 IF THEY DID SOMETHING LIKE JUNIPER AND SAID, SET CLOCK OR SET
01:52PM 14 DATE OR CHOSE TO DO THAT, THIS WOULDN'T BE ONE OF THE ELEMENTS
01:53PM 15 THAT WE PUT IN THERE.

01:53PM 16 THE COURT: OKAY.

01:53PM 17 MR. NELSON: BECAUSE -- THAT'S SOME OF YOUR HONOR'S
01:53PM 18 CONCERN, BECAUSE YOU DON'T WANT TO HAVE BASICALLY SOME ELEMENTS
01:53PM 19 AND KIND OF SHUTTING OFF ALL THE OPTIONS WITH RESPECT TO THAT.

01:53PM 20 BUT REMEMBER, THAT'S NOT HOW WE GOT HERE, RIGHT. WE DIDN'T
01:53PM 21 GET HERE BECAUSE THEY HAPPENED TO HAVE SOME THINGS THAT WERE
01:53PM 22 SIMILAR WITH NO ACCESS TO THE WORK OR ANYTHING ALONG THOSE
01:53PM 23 LINES.

01:53PM 24 AND THEN IT BECOMES MORE IMPORTANT IT FILTER THINGS,
01:53PM 25 BECAUSE THAT'S KIND OF THE POINT, AT LEAST WHEN I READ THE

01:53PM 1 CASES BEHIND FILTRATION IS, YEAH, THERE'S SIMILARITIES, BUT I
01:53PM 2 DO NOT WANT YOU TO HAVE OVERWHELMING EVIDENCE AND SIMILARITIES
01:53PM 3 THAT ARE REALLY OUT THERE.

01:53PM 4 THIS IS, THEY SPECIFICALLY SET OUT TO COPY SO THAT THEY
01:53PM 5 COULD RECREATE THE CISCO CLI SO THEY COULD GO TO CISCO
01:53PM 6 CUSTOMERS AND SAY HEY, I'M A 99.999 PERCENT DROP IN REPLACEMENT
01:53PM 7 FOR YOU.

01:53PM 8 SO THIS ISN'T A SITUATION WHERE WE ARE TRYING TO OVER
01:54PM 9 EXTEND AND THEREFORE YOU'VE GOT TO FILTER THOSE THINGS OUT.
01:54PM 10 THIS IS JUST FURTHER EVIDENCE OF THAT DIRECT COPYING.

01:54PM 11 SO I WOULD SUBMIT IT'S A BIT OF A DIFFERENT CASE. AND
01:54PM 12 MAYBE THAT RESOLVES SOME OF THE ISSUES HERE BECAUSE THAT'S WHAT
01:54PM 13 WE ARE GOING IT TALK ABOUT. BUT, YOU KNOW, ON SET CLOCK OR
01:54PM 14 EXCUSE ME, CLOCK SET, BECAUSE I'M NOT CLAIMING SET CLOCK FOR
01:54PM 15 SURE, THAT'S REALLY, THAT'S IT, THAT'S WHAT THE EVIDENCE WOULD
01:54PM 16 BE. I DON'T HAVE, YOU KNOW, ANY KIND OF MAGIC WITH RESPECT TO
01:54PM 17 THAT. I'M JUST GIVING YOU WHAT IS GOING TO BE OUT THERE.

01:54PM 18 SO I MEAN, IF THAT'S SOMETHING, GIVEN ALL THAT, YOUR HONOR
01:54PM 19 IS COMFORTABLE WITH, OKAY. IF IT'S NOT, IF YOU GIVE US SOME
01:54PM 20 GUIDELINES IN TERMS OF WHAT YOU ARE COMFORTABLE WITH, WE ARE
01:54PM 21 PERFECTLY HAPPY TO TRY TO DISCUSS WITH THE OTHER SIDE AND
01:54PM 22 RESOLVE SOMETHING SO THAT YOU'RE COMFORTABLE WITH IT.

01:54PM 23 AND I MEAN, I'M NOT HIDING ANYTHING, YOU KNOW THE REASON
01:55PM 24 WHY.

01:55PM 25 THE COURT: SURE.

01:55PM 1 MR. NELSON: SO -- ALL RIGHT. SO THAT'S THE CLOCK
01:55PM 2 SET.

01:55PM 3 SO THEN LET ME TALK ABOUT SHOW INVENTORY A BIT, BECAUSE
01:55PM 4 THAT'S ANOTHER ONE. AND THIS ONE IS A LITTLE BIT OF A
01:55PM 5 DIFFERENT REASON.

01:55PM 6 SO IF I GO TO SLIDE 43, OKAY, THIS IS SOME TESTIMONY FROM
01:55PM 7 MR. REMAKER WHO HE WAS ON THE PARSER POLICE COMMITTEE, FOR LACK
01:55PM 8 OF A BETTER TERM, PARSER POLICE FORCE, MAYBE THAT'S A GOOD
01:55PM 9 TERM.

01:55PM 10 SO HE SAYS HERE, THIS IS IN HIS DEPOSITION TALKING ABOUT
01:55PM 11 THE SHOW INVENTORY. WHAT IS THE FUNCTIONALITY, WHAT FUNCTION
01:55PM 12 IS PERFORMED BY THE SHOW INVENTORY COMMAND? THE SHOW INVENTORY
01:55PM 13 COMMAND PROVIDES A LIST OF ALL THE HARDWARE ITEMS IN A SPECIFIC
01:55PM 14 CISCO DEVICE, INCLUDING THEIR PART NUMBER, VERSION NUMBER,
01:55PM 15 SERIAL NUMBER AND NAME, TO THE EXTENT THAT THAT INFORMATION IS
01:55PM 16 AVAILABLE.

01:55PM 17 OKAY. SO THAT'S THE FUNCTIONALITY. IF I GO TO THE NEXT
01:56PM 18 SLIDE, NOW, HERE, AND I DON'T WANT TO READ ALL OF THIS BECAUSE
01:56PM 19 THAT SLOWS US DOWN, BUT BASICALLY WHAT HE WAS ASKED IS WHAT ARE
01:56PM 20 SOME OF THE OTHER OPTIONS?

01:56PM 21 AND HE LISTS, YOU KNOW, 6 OR 8 OTHER OPTIONS THAT WOULD
01:56PM 22 STILL BE CONSISTENT WITH THE HIERARCHY THAT CISCO HAD IN PLACE,
01:56PM 23 MEANING THIS IS GOING TO BE PART OF THE SHOW HIERARCHY BECAUSE
01:56PM 24 THAT'S WHAT WE THINK IT SHOULD BE. SO THAT WAS -- THAT HAD
01:56PM 25 BEEN RESOLVED.

01:56PM 1 BUT EVEN WITHIN THAT, HERE'S A WHOLE BUNCH OF DIFFERENT
01:56PM 2 CHOICES THAT IT COULD HAVE HAD. AND THEN THERE'S SOME
01:56PM 3 ADDITIONAL TESTIMONY ABOUT WHY YOU SETTLED ON THAT ONE.

01:56PM 4 AND NOW IT TURNS OUT, IF YOU GO TO THE NEXT SLIDE, THERE
01:56PM 5 ACTUALLY IS SOME INDUSTRY STANDARD DOCUMENTATION WITH RESPECT
01:56PM 6 TO THIS.

01:56PM 7 AND THAT TYPE OF THE DESCRIPTION THAT I READ OF WHAT IT IS,
01:57PM 8 THE INFORMATION IT'S TRYING TO GIVE YOU, THAT'S ACTUALLY IN THE
01:57PM 9 INDUSTRY REFERRED TO AS MODULE IDENTITY, RIGHT.

01:57PM 10 SO THE MORE NATURAL WAY WOULD BE TO SHOW MODULE OR SHOW
01:57PM 11 IDENTITY. AND IN FACT, THAT'S WHAT OTHER PEOPLE DO, YOU KNOW,
01:57PM 12 THOSE KINDS OF COMMANDS. CISCO CHOSE SHOW INVENTORY.

01:57PM 13 AND SO IT ACTUALLY IS A COUNTER INTUITIVE, IT'S SOMETHING
01:57PM 14 THAT IS A UNIQUE THING TO CISCO AND WOULD ACTUALLY BE COUNTER
01:57PM 15 TO IF YOU WERE JUST TRYING TO STICK WITH PURELY INDUSTRY
01:57PM 16 STANDARD TERMINOLOGY WHERE YOU DIDN'T HAVE, YOU KNOW, OPTIONS
01:57PM 17 AND THINGS LIKE THAT, YOU WOULD HAVE PICKED SOMETHING
01:57PM 18 DIFFERENT.

01:57PM 19 SO THERE CERTAINLY ARE EXAMPLES OF THAT AS WELL IN HERE. I
01:57PM 20 DON'T THINK I NEED TO GO THROUGH TOO MUCH MORE, THERE'S JUST
01:57PM 21 ADDITIONAL TESTIMONY AND SOME DOCUMENTATION ON THAT.

01:58PM 22 SO LET ME TALK ABOUT THE MODES AND PROMPTS THEN --

01:58PM 23 THE COURT: OKAY.

01:58PM 24 MR. NELSON: BECAUSE I THINK YOU HAD SOME CONCERNS
01:58PM 25 ABOUT THAT.

01:58PM 1 THE COURT: AND PART OF IT MAY REALLY NOT BEING ABLE
01:58PM 2 TO UNDERSTAND WHAT THE MODES AND PROMPTS ARE.

01:58PM 3 MR. NELSON: SO I DON'T THINK I NEED TO SPEND A LOT
01:58PM 4 OF TIME ON OUTPUTS.

01:58PM 5 AND THE HELP DESCRIPTIONS, A LOT OF IT IS THE SAME ISSUES
01:58PM 6 THAT WERE -- THAT I ALREADY COVERED. SO I DON'T NEED TO REPEAT
01:58PM 7 ALL OF THAT.

01:58PM 8 THE COURT: I DON'T THINK YOU DO.

01:58PM 9 MR. NELSON: SO IF WE LOOK AT SLIDE 28, YOU KNOW,
01:58PM 10 THESE SCREEN OUTPUTS THAT WE ARE TALKING ABOUT ARE PRETTY
01:58PM 11 EXPANSIVE, THERE'S A LOT OF STUFF, WHAT INFORMATION YOU CHOOSE
01:58PM 12 TO PUT IN THERE, HOW YOU CHOOSE TO STRUCTURE IT, SET IT UP SO
01:58PM 13 IT MAKES SENSE TO ONE OF THESE ENGINEERS.

01:58PM 14 SO I'M NOT REALLY SURE THERE'S A WHOLE BUNCH OF DISPUTE
01:58PM 15 ABOUT THAT BECAUSE WE ARE NOT TALKING ABOUT SINGLE WORDS OR
01:58PM 16 THINGS LIKE THAT.

01:58PM 17 THE COURT: OKAY.

01:59PM 18 MR. NELSON: SO LET ME THEN GO TO SLIDE 30, AND THE
01:59PM 19 MODES AND PROMPTS AND EXPLAIN A LITTLE BIT WHAT WE ARE
01:59PM 20 CLAIMING.

01:59PM 21 AND I'M PROBABLY THE BEST PERSON TO DO THIS BECAUSE I
01:59PM 22 DIDN'T UNDERSTAND AND IT HAD TO BE EXPLAINED TO ME A FEW TIMES.

01:59PM 23 BECAUSE YOU WILL NOTICE, I FORGET EXACTLY THE LANGUAGE, BUT
01:59PM 24 THE DESCRIPTION THAT WE HAD GIVEN IS WE ARE NOT CLAIMING AN
01:59PM 25 INDIVIDUAL MODE STANDING BY ITSELF, RIGHT, SO NOT USER EXEC,

01:59PM 1 PRIVILEGE EXEC, GLOBAL CONFIG, INTERFACE CONFIGURATION, NOT
01:59PM 2 THOSE MODES STANDING BY THEMSELVES AND THE ASSOCIATED PROMPTS
01:59PM 3 WITH THOSE PARTICULAR MODES, ALTHOUGH THERE ARE TWO OF THESE
01:59PM 4 THAT ARE, GLOBAL CONFIGURATION AND INTERFACE CONFIGURATION THAT
01:59PM 5 ARE ORIGINAL TO CISCO BASED UPON THE EVIDENCE IN THE CASE.

01:59PM 6 WHAT WE SAY IS IT'S THE SPECIFIC RELATIONSHIP BETWEEN THOSE
01:59PM 7 MODES. IN OTHER WORDS, HOW THOSE MODES INTERRELATE IN THE USER
01:59PM 8 INTERFACE.

01:59PM 9 AND THIS DOCUMENT I THOUGHT WAS PRETTY GOOD TO EXPLAIN
02:00PM 10 THAT, BECAUSE IF WE SEE HERE, YOU GOT USER EXEC MODE, AND I
02:00PM 11 THINK OF THAT AS BEING KIND OF A TOP LEVEL MODE THAT YOU ENTER
02:00PM 12 INTO.

02:00PM 13 SO YOU LOG IN, AND IT GIVES A PARTICULAR PROMPT. SO YOU
02:00PM 14 ARE NOW IN USER EXEC MODE. WELL, HOW DO YOU GET TO PRIVILEGE
02:00PM 15 EXEC MODE, RIGHT? WELL, PRIVILEGE EXEC MODE, IT'S FROM USER
02:00PM 16 EXEC MODE, YOU ISSUE THE ENABLE COMMAND. SO THAT'S HOW YOU GET
02:00PM 17 THERE. YOU WOULD BE IN THE ONE, IN EXEC MODE, YOU GET THERE
02:00PM 18 FIRST AND THEN YOU GET TO THE PRIVILEGE EXEC MODE.

02:00PM 19 AND THAT GIVES YOU A DIFFERENT PROMPT THAT TELLS YOU THERE.

02:00PM 20 NOW HOW DO YOU GET TO GLOBAL CONFIG THEN. WELL FROM
02:00PM 21 PRIVILEGE EXEC MODE YOU ISSUE THE CONFIGURE TERMINAL COMMAND.
02:00PM 22 SO AGAIN THERE'S A RELATIONSHIP, YOU GO FROM ONE TO THE NEXT TO
02:00PM 23 THE NEXT IN A PARTICULAR WAY.

02:00PM 24 AND THEN FINALLY AN INTERFACE CONFIG, YOU DO THAT AS WELL
02:00PM 25 FROM THE GLOBAL CONFIG MODE, THE HISTORY OF THE INTERFACE

02:01PM 1 COMMAND AND YOU GO THERE.

02:01PM 2 AND WHAT WE ARE SAYING IS THEY HAVE THOSE MODES WHICH

02:01PM 3 FRANKLY ARE THE FOUR MAIN MODES, THE FOUR MOST IMPORTANT MODES

02:01PM 4 IN THE CLI, AND THEY HAVE EXACTLY THE SAME RELATIONSHIP. YOU

02:01PM 5 GO FROM ONE TO THE OTHER IN THE SAME PARTICULAR WAY.

02:01PM 6 SO THAT'S --

02:01PM 7 THE COURT: I GUESS I'M NOT WITH YOU ON THAT.

02:01PM 8 SO IF YOU ARE IN USER EXEC AND YOU GET, I'M NOT

02:01PM 9 UNDERSTANDING HOW IT WORKS, I'M SORRY.

02:01PM 10 MR. NELSON: YEAH. SO YOU HAVE TO GO TO USER EXEC

02:01PM 11 FIRST, RIGHT. I WILL TELL YOU APPLY UNDERSTANDING --

02:01PM 12 THE COURT: I MEAN, DO YOU PHYSICALLY TYPE THAT IN,

02:01PM 13 USER EXEC?

02:01PM 14 MR. NELSON: NO, YOU LOG IN. YOU LOG INTO THE

02:01PM 15 SWITCH. AND THAT PUTS YOU IN USER EXEC MODE.

02:01PM 16 THE COURT: THEN YOU ARE THERE.

02:01PM 17 MR. NELSON: THEN YOU ARE THERE. AND YOU WILL GET

02:01PM 18 THIS ROUTER WITH THE CARROT SIGN. YOU WILL GET THAT PROMPT.

02:01PM 19 AND THAT TELLS YOU HEY, YOU ARE IN USER EXEC MODE.

02:01PM 20 THE COURT: OKAY.

02:01PM 21 MR. NELSON: NOW ONCE YOU ARE THERE, YOU CAN ISSUE A

02:01PM 22 COMMAND. YOU CAN ISSUE OTHER COMMANDS TOO, RIGHT, BECAUSE

02:01PM 23 THERE'S CERTAIN COMMANDS THAT ARE AVAILABLE, BUT IF YOU WANT TO

02:02PM 24 GO TO PRIVILEGE EXEC MODE, YOU ARE IN THAT.

02:02PM 25 SO YOU HAVE THAT CARROT, THE ROUTER PROMPT OR THE CARROT

02:02PM 1 SIGN, AND YOU ISSUE THE ENABLE COMMAND. YOU SAY ENABLE. SO
02:02PM 2 YOU TYPE THAT IN. AND THAT WILL PUT YOU INTO PRIVILEGE EXEC
02:02PM 3 MODE.

02:02PM 4 SO NOW YOU ARE IN PRIVILEGE EXEC MODE. HOW DO YOU KNOW YOU
02:02PM 5 ARE IN PRIVILEGE EXEC MODE? BECAUSE NOW YOU WILL GET THE POUND
02:02PM 6 SIGN.

02:02PM 7 THE COURT: OKAY.

02:02PM 8 MR. NELSON: NOW THEN, AND THERE'S CERTAIN OTHER
02:02PM 9 THINGS YOU CAN DO, RIGHT, IN PRIVILEGE EXEC MODE, IT'S A
02:02PM 10 DIFFERENT MODE OF OPERATION.

02:02PM 11 THE COURT: SO THAT'S YOUR LAST COLUMN THERE, THAT'S
02:02PM 12 WHAT YOU CAN DO IN THAT PRIVILEGE EXEC MODE, THOSE ARE THE
02:02PM 13 THINGS YOU CAN DO?

02:02PM 14 MR. NELSON: YEAH, THAT'S TELLING YOU THE TYPES OF
02:02PM 15 FUNCTIONS AND ACCESS THAT YOU HAVE IN THAT PARTICULAR MODE.

02:02PM 16 SO THEN WHEN YOU'RE IN PRIVILEGE EXEC MODE AND YOU HAVE
02:02PM 17 THAT POUND SIGN, YOU KNOW, PROMPT, YOU CAN TYPE IN CONFIGURE
02:03PM 18 TERMINAL THERE AND THAT WILL PUT YOU INTO WHAT'S CALLED GLOBAL
02:03PM 19 CONFIGURATION MODE. AND THAT GIVES YOU THIS OTHER PROMPT, THE
02:03PM 20 ROUTER CONFIG AND THEN THE POUND SIGN. SO IT GIVES YOU A
02:03PM 21 DIFFERENT PROMPT TO TELL YOU THAT THAT'S WHERE YOU ARE.

02:03PM 22 AND THEN FROM THAT MODE, ONCE YOU ARE IN THERE AND YOU HAVE
02:03PM 23 THAT PROMPT, IF YOU WANT TO GO TO INTERFACE CONFIGURATION YOU
02:03PM 24 ISSUE THE INTERFACE COMMAND AND THEN YOU GET THE OTHER PROMPT
02:03PM 25 TO GO IN THERE.

02:03PM 1 SO WHAT WE ARE SAYING IS, WHAT'S THAT THEY HAVE IS THOSE
02:03PM 2 SAME MODES OF OPERATION, BUT WE ARE NOT SAYING, HEY, IF ALL YOU
02:03PM 3 HAD WAS USER EXEC, THEN PRIVILEGE EXEC MODE AND GLOBAL CONFIG
02:03PM 4 AND INTERFACE CONFIG STANDING ALONE AND YOU DIDN'T HAVE THE
02:03PM 5 INTERRELATIONSHIP, WE WOULDN'T BE CLAIMING THAT.

02:03PM 6 THEY HAVE THE SAME INTERRELATIONSHIP, THE SAME FLOW THROUGH
02:03PM 7 THE MODES. IN OTHER WORDS, YOU GET INTO USER EXEC MODE, YOU
02:03PM 8 GET THE SAME PROMPT. YOU GET INTO PRIVILEGE EXEC MODE, THE
02:03PM 9 SAME WAY, FROM PRIVILEGE EXEC MODE INTO GLOBAL CONFIG MODE YOU
02:04PM 10 GET THERE THE SAME WAY.

02:04PM 11 THE COURT: NOT EVERYONE HAS ACCESS, THESE ARE
02:04PM 12 RESTRICTED MODES.

02:04PM 13 MR. NELSON: THEY MAY VERY WELL BE.

02:04PM 14 MR. PAK: YES, YOUR HONOR. SOME OF THE MODES REQUIRE
02:04PM 15 PASSWORD PROTECTION.

02:04PM 16 MR. NELSON: RIGHT.

02:04PM 17 THE COURT: BUT YOU HAVE TO GO THROUGH, YOU HAVE TO
02:04PM 18 START AT USER EXEC AND WORK YOUR WAY THROUGH EACH OF THESE --

02:04PM 19 MR. NELSON: THAT'S CORRECT.

02:04PM 20 THE COURT: SO THIS IS REALLY A PATH THROUGH. YOU
02:04PM 21 CAN'T GO DIRECTLY INTO INTERFACE CONFIGURATION.

02:04PM 22 MR. NELSON: YEAH, THAT'S RIGHT.

02:04PM 23 AND THAT IS -- THAT'S THE SAME WAY THAT THEY CHOSE TO SET
02:04PM 24 THEIRS UP, WHICH IS WHAT WE ARE SAYING, IS THAT ELEMENT IS
02:04PM 25 PROTECTABLE AND MAKES IT LOOK MORE LIKE, MAKES IT LOOK LIKE THE

02:04PM 1 CISCO CLI.

02:04PM 2 SO THAT'S WHAT WE ARE CLAIMING WITH RESPECT TO MODES AND
02:04PM 3 PROMPTS.

02:04PM 4 I MEAN, AGAIN, IT SEEMS TO ME THAT THEIR --

02:04PM 5 THE COURT: SO IT'S THIS PARTICULAR PATH.

02:04PM 6 MR. NELSON: YEAH, THE PARTICULAR RELATIONSHIP
02:04PM 7 BETWEEN THE MODES AND PROMPTS, YOU KNOW, THAT THEY USE THAT
02:04PM 8 EXACTLY THE SAME COMBINATION.

02:05PM 9 THE COURT: SO THE PROMPT OBVIOUSLY COULD BE ANYTHING
02:05PM 10 UNLESS -- THESE DON'T LOOK FUNCTIONAL TO ME BUT THEY COULD BE
02:05PM 11 INDUSTRY STANDARD, THAT I DON'T KNOW. I WILL HEAR ABOUT THAT
02:05PM 12 IN A MINUTE. THESE ARE COMMON SYMBOLS, BUT I DON'T KNOW WHAT
02:05PM 13 THEY MEAN IN THE INDUSTRY.

02:05PM 14 MR. NELSON: RIGHT. EXACTLY.

02:05PM 15 SO WE ARE NOT SAYING THAT ANY OF THOSE THINGS STANDING
02:05PM 16 ALONE, RIGHT, IT IS, AS YOUR HONOR SAID, THAT
02:05PM 17 INTERRELATIONSHIP, THE PATH WHICH WOULD INCLUDE THE PATH
02:05PM 18 THROUGH THERE.

02:05PM 19 THE COURT: SO IT'S THE IDENTICAL MODE AND PROMPT FOR
02:05PM 20 EACH OF YOUR FOUR VERSIONS THAT ARE YOUR WORKS.

02:05PM 21 MR. NELSON: YEAH, EXACTLY.

02:05PM 22 THE COURT: OKAY.

02:05PM 23 MR. NELSON: AND AGAIN, WE HAVE COPYING OF THAT,
02:05PM 24 THAT'S WHAT THE EVIDENCE IS GOING TO BE, THAT THEY SAT DOWN TO
02:05PM 25 DO THAT.

02:05PM 1 SO WE ARE NOT TRYING TO EXPAND THE PROTECTION, WHICH IS
02:05PM 2 KIND OF WHAT THEY INTIMATED IN THE BRIEF, SAYING OH, WELL OTHER
02:05PM 3 PEOPLE GOT USER EXEC MODE.

02:05PM 4 THAT'S NOT WHAT WE ARE SAYING. WE ARE NOT SAYING HEY IF
02:05PM 5 YOU JUST HAD USER EXEC MODE AND THAT WAS IT, THAT WOULD BE
02:05PM 6 SOMETHING WE COULD ARGUE WAS COPYRIGHT INFRINGEMENT, AN ELEMENT
02:06PM 7 OF IT THAT I COULD PROVE.

02:06PM 8 AND THE SAME WITH PRIVILEGE EXEC MODE, AND WE PROBABLY
02:06PM 9 COULD HAVE WITH GLOBAL CONFIG AND INTERFACE CONFIG, BUT WE
02:06PM 10 DIDN'T CHOOSE TO DO THAT.

02:06PM 11 MR. PAK: THE LAST TWO MODES IN THE RED BOX, WE
02:06PM 12 CALLED THEM CISCO ORIGINALS. JUST TO CLARIFY FOR YOUR HONOR
02:06PM 13 THAT THOSE ARE MODES WE CREATED AND NO ONE ELSE HAD.

02:06PM 14 SO THIS ISN'T SIMPLY AN ISSUE OF TAKING EXISTING MODES THAT
02:06PM 15 PREDATED US, THESE ARE MODES THAT MR. LOUGHEED CREATED ON HIS
02:06PM 16 OWN, DOCTOR BLACK AND OTHERS FROM ARISTA HAVE NOT FOUND ANY
02:06PM 17 OTHER SYSTEM THAT HAD THIS PARTICULAR GLOBAL CONFIGURATION AND
02:06PM 18 INTERFACE CONFIGURATION MODE.

02:06PM 19 BUT JUST TO BE ABSOLUTELY CLEAR ON THE PROTECTABILITY
02:06PM 20 FINDING, WE ARE NOT CLAIMING ORIGINALITY JUST IN A SEPARATE
02:06PM 21 RULE, WE ARE SAYING WHEN YOU LOOK AT THIS COLLECTION OF THINGS,
02:06PM 22 THESE FOUR MODES AND PROMPTS, AS MR. NELSON TALKED ABOUT, HOW
02:06PM 23 YOU SEQUENCE THROUGH THEM AND HOW THEY WORK TOGETHER AS A
02:06PM 24 GROUP, NO ONE HAD THAT BEFORE WE DID. AND ARISTA COPIED IT
02:06PM 25 BECAUSE THEY WANTED TO REPLICATE THE EXPERIENCE, AND THAT'S THE

02:07PM 1 BASIS FOR THE COPYRIGHT INFRINGEMENT CLAIM.

02:07PM 2 THE COURT: SO I MEAN, YOU REALLY ARE ONLY ALLEGING
02:07PM 3 THAT IT'S COPIED IF IT'S COPIED EXACTLY.

02:07PM 4 MR. PAK: CORRECT, YOUR HONOR.

02:07PM 5 THE FOUR SEQUENCES, THE FOUR MODES AND PROMPTS WITH THOSE
02:07PM 6 SPECIFIC PROMPTS.

02:07PM 7 AND THEN WE ARE NOT SAYING, JUST BECAUSE I MENTIONED IT, I
02:07PM 8 DIDN'T HAVE A CHANCE TO HAVE MR. NELSON INCORPORATE THIS INTO
02:07PM 9 HIS PRESENTATION, BUT IF WE COULD PUT UP, THIS IS IN
02:07PM 10 DR. ALMEROTH'S OPENING REPORT WHICH IS ONE OF THE DOCUMENTS,
02:07PM 11 THE LONG LIST OF DOCUMENTS THAT WERE FILED WITH YOUR HONOR, BUT
02:07PM 12 JUST TO ILLUSTRATE THE POINT THAT THE HIERARCHY EXISTS IN THE
02:07PM 13 USER INTERFACE, YOUR HONOR, SO AS I WAS MENTIONING, IF YOU
02:07PM 14 LOOK -- IF YOU BLOW UP THE TOP MR. FISHER.

02:07PM 15 SO YOU WILL SEE THAT THE SWITCH, THE CARROT SIGN, THEN THAT
02:07PM 16 USER EXEC MODE THAT MR. NELSON WAS TALKING ABOUT, I REMEMBER
02:07PM 17 THE "SHOW HIERARCHY" STARTING WITH THE WORD SHOW, BUT I DON'T
02:07PM 18 KNOW THE REST OF THE COMMANDS IN THE REST OF THE HIERARCHY.

02:07PM 19 SO WHAT'S INTERESTING ABOUT THE CISCO CLI IS THAT YOU CAN
02:08PM 20 TYPE IN A QUESTION MARK AND TELL THE SYSTEM, I REMEMBER THERE'S
02:08PM 21 A HIERARCHY, I REMEMBER THE SEARCH WORD SHOW, I DON'T REMEMBER
02:08PM 22 THE REST OF THE ELEMENTS.

02:08PM 23 THE COURT: SO THEN IT SHOWS ME MY CHOICES IN SHOW.

02:08PM 24 MR. PAK: I SEE SHOW, QUESTION MARK, SHOW ARP, SHOW
02:08PM 25 CLARK, SHOW DIAGNOSTIC, DOT1Q-TUNNEL. THE ONES HIGHLIGHTED IN

02:08PM 1 YELLOW ARE THE ONES THAT ARISTA HAS COPIED FROM THIS HIERARCHY.
02:08PM 2 BUT THE HIERARCHY IS A LONGER SET, OBVIOUSLY, OF THINGS HERE.

02:08PM 3 SO WHAT WE ARE SHOWING HERE IS THAT THE HIERARCHY EXISTS IN
02:08PM 4 THE USER INTERFACE IN THE SENSE BOTH HOW THE USER THINKS ABOUT
02:08PM 5 THE COMMANDS AND HOW THEY ARE ORGANIZED BUT ALSO DIRECTLY ON
02:08PM 6 HOW THIS GETS BACK TO THE USER IN TERMS OF THESE HELP
02:08PM 7 DESCRIPTIONS.

02:08PM 8 AND SO WHAT'S INTERESTING IS WE BELIEVE THAT THEY COPIED
02:08PM 9 THE HIERARCHY BECAUSE THEY HAVE THIS PARTICULAR ORGANIZATION
02:08PM 10 GROUPINGS, WE ALSO BELIEVE THE HELP DESCRIPTIONS THAT WE HAVE
02:08PM 11 BEEN FIGHTING SO MUCH ABOUT IN THIS CASE YOUR HONOR, THOSE ARE
02:08PM 12 THE HELP DESCRIPTIONS THAT YOU GET NEXT TO THESE COMMAND NAMES,
02:09PM 13 SO YOU CAN SEE HOW ARP HAS AN ARP TABLE, CLOCK HAS DISPLAYS AS
02:09PM 14 SYSTEM CLOCK.

02:09PM 15 SO THOSE ARE SOME OF THE HELP DESCRIPTIONS THAT ARISTA ALSO
02:09PM 16 COPIED FROM OUR SYSTEM. SO THAT'S THE REASON WHY ALL THESE
02:09PM 17 ELEMENTS WORK TOGETHER, BUT THE HIERARCHY DOES EXIST,
02:09PM 18 YOUR HONOR, IN THE USER INTERFACE, THE HIERARCHY IS REFLECTED
02:09PM 19 IN THE COMMAND ORGANIZATION, WHICH AS MR. NELSON TALKED ABOUT,
02:09PM 20 WE ARE NOT CLAIMING THE IDEA OF TRYING TO ORGANIZE THIS INTO A
02:09PM 21 HIERARCHY, WE ARE CLAIMING THE SPECIFIC SEQUENCE STRUCTURE AND
02:09PM 22 ORGANIZATION WHICH UNDER JOHNSON CONTROLS AND ALL THE OTHER
02:09PM 23 CASES WE ARE TALKING ABOUT, ABSOLUTELY PROTECTABLE UNDER
02:09PM 24 COPYRIGHT LAW.

02:09PM 25 SO WE ARE TALKING ABOUT THE SEQUENCE STRUCTURE AND

02:09PM 1 ORGANIZATION OF THESE COMMANDS INTO A HIERARCHY, IT'S PRESENT
02:09PM 2 IN THE USER INTERFACE, YOU CAN ACTUALLY SEE IT BY TYPING SOME
02:09PM 3 OF THESE QUESTION MARK COMMANDS, AND THEN IT WILL RESPOND BACK
02:09PM 4 WITH A VISUAL REPRESENTATION OF THE HIERARCHY.

02:09PM 5 THE COURT: SO IN THE HELP DESCRIPTIONS FOR ANY OF
02:10PM 6 THESE INITIAL WORDS IN THE COMMAND LINE, IF I USE THAT WORD AND
02:10PM 7 A QUESTION MARK, I WILL HAVE REVEALED TO ME THE HIERARCHY IT
02:10PM 8 COMES FROM.

02:10PM 9 MR. PAK: THAT'S RIGHT. ABSOLUTELY.

02:10PM 10 THE COURT: AND IF IT DOESN'T COME -- YOU SAID SOME
02:10PM 11 DON'T FROM IF HIERARCHIES.

02:10PM 12 MR. PAK: RIGHT. SOME IT MAY BE ONE-OFF WORDS OR
02:10PM 13 COMMANDS WHICH DON'T HAVE HIERARCHIES ASSOCIATED WITH THEM.

02:10PM 14 THE COURT: BUT IF -- LET ME JUST ASK YOU THAT.

02:10PM 15 LET'S SAY WE HAD ONE THAT IS NOT PART OF HIERARCHY, IT'S
02:10PM 16 JUST A DISCREET COMMAND LINE. IF I PUT THE FIRST WORD, AND
02:10PM 17 IT'S A UNIQUE FIRST WORD, WILL THE HELP DESCRIPTIONS GIVE ME
02:10PM 18 THAT ONE?

02:10PM 19 MR. PAK: EXACTLY. IT WILL JUST SHOW YOU THERE'S
02:10PM 20 ONLY ONE COMMAND THAT'S POSSIBLE AND THEY WILL TELL YOU THE
02:10PM 21 HELP DESCRIPTIONS FUNCTION.

02:10PM 22 MR. NELSON: RIGHT.

02:10PM 23 BECAUSE THE WAY THE -- ONCE YOU GET DOWN TO THE PARTICULAR
02:10PM 24 COMMAND, WHEN YOU HAVE A UNIQUE COMMAND, IT MAY TELL YOU
02:10PM 25 SOMETHING ABOUT THAT PARTICULAR COMMAND AS WELL.

02:10PM 1 SO YOU DON'T ALWAYS JUST NECESSARILY GET A LIST OF THE NEXT
02:10PM 2 LEVEL. BUT YEAH, SO IT'S -- I MEAN, HOPEFULLY THE AFTERNOON
02:11PM 3 WAS A LITTLE BIT MORE HELPFUL THAN THE MORNING, YOUR HONOR.

02:11PM 4 THE COURT: WELL, I'M JUST TRYING TO GET MYSELF
02:11PM 5 ORIENTED BECAUSE WE -- SO LET ME JUST GO ON A LITTLE BIT.

02:11PM 6 I THINK THAT YOU ARE RIGHT THAT THE COMMAND RESPONSES ARE
02:11PM 7 REALLY THE SAME ISSUES PERVADE THEM AS THE COMMAND LINES
02:11PM 8 THEMSELVES. AND THE HELP DESCRIPTIONS ARE LARGELY THE SAME
02:11PM 9 ISSUES.

02:11PM 10 MR. NELSON: I THINK THAT'S RIGHT. IT'S THE SAME
02:11PM 11 CHALLENGES.

02:11PM 12 I SHOWED YOU ONE OF THE COMMAND OUTPUTS BECAUSE I REALLY DO
02:11PM 13 THINK THOSE ARE SO DIFFERENT IN KIND.

02:11PM 14 THE COURT: SO LET ME THEN JUST ASK YOU ABOUT THE
02:11PM 15 LAST CATEGORY WHICH COMES FROM THE DOCUMENTATION WHICH I WILL
02:11PM 16 CALL THE MANUALS.

02:11PM 17 AND JUST SO THAT I CAN BE CLEAR ON THE DEFINITION OF THE
02:11PM 18 WORKS, EACH MANUAL IS IT'S OWN WORK.

02:11PM 19 MR. NELSON: YEAH, THAT IS CORRECT.

02:11PM 20 THE COURT: OKAY.

02:11PM 21 AND IN YOUR -- WHEN YOU'VE SHOWN ME THE TECHNICAL
02:12PM 22 DOCUMENTATION, YOU DIDN'T NECESSARILY SHOW IT TO ME IN ORDER OF
02:12PM 23 THE WORK IT COMES FROM, WHICH IS FINE, I MEAN, IT DOESN'T
02:12PM 24 MATTER, YOU CAN REORGANIZE IT ANY WAY YOU WANT, THAT'S REALLY
02:12PM 25 NOT THE ISSUE.

02:12PM 1 BUT YOU'VE GIVEN ME A SERIES OF BOXES, AND SOME OF THEM,
02:12PM 2 AND YOU'VE HIGHLIGHTED IN RED PORTIONS THAT YOU ARE CLAIMING
02:12PM 3 HAVE BEEN COPIED, CORRECT?

02:12PM 4 MR. NELSON: CORRECT.

02:12PM 5 THE COURT: AND SO, I MEAN, FOR EXAMPLE, I'M LOOKING
02:12PM 6 AT PAGE 111, AND YOUR FIRST IS THE SHOW VRRP, AND ANOTHER BOX
02:12PM 7 THAT IS HIGHLIGHTED, THAT'S FROM THE IOS IP APPLICATION
02:12PM 8 SERVICES COMMAND REFERENCE 2011 AT PAGE 76.

02:12PM 9 THE NEXT ONE IS FROM A DIFFERENT -- IT'S FROM A MULTI TASK
02:13PM 10 COMMAND REFERENCE. THAT'S A DIFFERENT WORK, ISN'T IT?

02:13PM 11 MR. NELSON: YEAH. THE CITATION, SO WE CAN -- IF IT
02:13PM 12 WOULD BE MORE HELPFUL FOR YOUR HONOR.

02:13PM 13 THE COURT: NO, NO, IT'S NOT. AS LONG AS I
02:13PM 14 UNDERSTAND IT, I DON'T NEED IT REARRANGED.

02:13PM 15 MR. NELSON: OKAY.

02:13PM 16 THE COURT: BUT ONE WOULD ULTIMATELY EXTRACT ALL THE
02:13PM 17 THINGS FROM A PARTICULAR MANUAL WHICH IS A WORK.

02:13PM 18 MR. PAK: RIGHT, YOUR HONOR.

02:13PM 19 THE COURT: AND IT LOOKS TO ME AS THOUGH FOR THE
02:13PM 20 SECOND ENTRY, SINCE IT'S FROM PAGE 293, THAT'S A PRETTY BIG
02:13PM 21 MANUAL.

02:13PM 22 MR. NELSON: YEAH, THE MANUAL --

02:13PM 23 THE COURT: AND IF YOU HAVE FOUR LINES THAT WERE
02:13PM 24 COPIED FROM ALMOST 300 PAGE MANUAL, THAT'S WHAT IT IS. IT IS
02:13PM 25 WHAT IT IS, RIGHT.

02:13PM 1 MR. VAN NEST: IT IS WHAT IT IS.

02:13PM 2 MR. NELSON: IT IS WHAT IT IS.

02:13PM 3 THE COURT: AND THEN THE JURY WILL DETERMINE WHETHER
02:13PM 4 THAT'S THE HEART AND SOUL OF THE MANUAL OR WHETHER IT'S JUST --
02:13PM 5 I MEAN, IS THAT REALLY -- AND THERE MAY BE MORE FROM THAT ONE.
02:13PM 6 IT'S JUST THAT FOR ALL OF THESE I HAVE NO ORIENTATION ABOUT THE
02:13PM 7 WORK.

02:13PM 8 AND I UNDERSTAND IT'S NOT NECESSARY NOW. I MEAN, THE FACT
02:14PM 9 THAT SOME OF THESE PHRASES COME OUT OF THE WORK, I MEAN, I
02:14PM 10 DON'T KNOW WHAT THE MAJOR ISSUE IS ON THESE. I MEAN, YOU SAY
02:14PM 11 THEY ARE COPIED, AND IT LOOKS AS THOUGH THESE ARE DESCRIPTIONS
02:14PM 12 IN MANUALS AND MANUALS ARE TYPICALLY COPYRIGHTED AND PROTECTED.

02:14PM 13 MR. PAK: AND YOUR HONOR, I DON'T REALLY THINK, AT
02:14PM 14 THE END OF THE DAY AT TRIAL, THAT THERE WOULD BE A REALLY
02:14PM 15 SUBSTANTIVE DISPUTE AS TO COPYRIGHTABILITY AND THE COPYING.

02:14PM 16 THE COURT: RIGHT. THIS IS NOT WHAT'S DRIVING THE
02:14PM 17 CASE.

02:14PM 18 MR. PAK: THERE ARE CEO ADMITTED IT WAS WRONG TO DO
02:14PM 19 IT, THEIR CEO SAID THEY TOOK OUT THESE PORTIONS FROM THE
02:14PM 20 DOCUMENT. WHAT THIS SHOWS THOUGH FROM OUR PERSPECTIVE THE
02:14PM 21 PERSUASIVENESS OF THE COPYING CONDUCT.

02:14PM 22 THE COURT: THAT'S FINE. AND I DIDN'T CONSIDER THIS
02:14PM 23 A PARTICULARLY HARD ONE.

02:14PM 24 THE MODES AND PROMPTS, I MEAN, IT'S -- YOU ARE REALLY, IT'S
02:14PM 25 A -- IT'S PRETTY STRAIGHTFORWARD WHAT YOU ARE ASKING TO

02:14PM 1 PROTECT.

02:14PM 2 MR. NELSON: CORRECT.

02:14PM 3 THE COURT: AND WITH ALL OF THESE, I THINK YOU HAVE
02:15PM 4 ESSENTIALLY CREATED THE ONLY ONE ANSWER THAT WOULD BE POSSIBLE
02:15PM 5 ON THE DEGREE OF PROTECTION BY THE WAY YOU'VE DESCRIBED EACH OF
02:15PM 6 THESE, IS THAT IT MATTERS THE ORDER AND SEQUENCE THAT THEY ARE
02:15PM 7 IN, CLOCK SET VERSUS SET CLOCK ARE TWO DIFFERENT THINGS.

02:15PM 8 MR. NELSON: WELL, RIGHT.

02:15PM 9 IT MATTERS FOR -- YEAH, FOR THE PURPOSE OF OUR CLAIM.

02:15PM 10 THE COURT: SO SUBSTANTIAL SIMILARITY IS JUST NOT
02:15PM 11 EVEN--

02:15PM 12 MR. NELSON: NO.

02:15PM 13 THE COURT: POSSIBLE HERE.

02:15PM 14 MR. NELSON: I DON'T THINK THAT'S WHAT KIND OF CASE
02:15PM 15 IT IS BECAUSE IT'S JUST A COPYING CASE.

02:15PM 16 THE COURT: YEAH.

02:15PM 17 MR. NELSON: SO THE WAY I SEE IT IS THIS CASE DOESN'T
02:15PM 18 REALLY COME IN.

02:15PM 19 THE COURT: IT'S AN AREA OF DISAGREEMENT THAT IS
02:15PM 20 MAYBE NO LONGER ON THE TABLE AND THAT'S HELPFUL.

02:15PM 21 AND SO YOUR ARGUMENT TO ME, BEFORE I TURN IT OVER TO
02:15PM 22 MR. SILBERT, IS THAT YOU DON'T CONCEDE ANY RESTRICTION ON ANY
02:15PM 23 OF THESE FIVE BUILDING BLOCKS, THEY ARE ALL IN, AS YOU'VE
02:15PM 24 PRESENTED THEM, I MEAN, I WILL HEAR THE ARGUMENTS, I'M SURE
02:16PM 25 MR. SILBERT WILL RETURN TO THE ISSUE OF NO AUTHORS FOR 198

02:16PM 1 COMMAND LINES, AND YOU HAVEN'T ADDRESSED THAT AT ALL. YOU'VE
02:16PM 2 BEEN UP A LEVEL AT A PROCESS FOR THE CREATIVE OR THE CREATION
02:16PM 3 OF THESE COMMAND LINES.

02:16PM 4 MR. NELSON: RIGHT.

02:16PM 5 THE COURT: AND YOU HAVEN'T TALKED ABOUT -- AND SO I
02:16PM 6 GUESS IT BEGS THE QUESTION OF IF I ACCEPT THAT YOU HAVE THE
02:16PM 7 PROCESS, DID YOU USE IT FOR EACH ONE OF THESE?

02:16PM 8 AND I WILL HEAR ABOUT THAT. I MEAN, I DON'T KNOW THAT.
02:16PM 9 YOU'VE WORKED AT A LEVEL OF GENERALITY.

02:16PM 10 MR. PAK: WE HAVE ALL THE EVIDENCE, YOUR HONOR.

02:16PM 11 SO AT TRIAL, THAT'S EXACTLY THE EVIDENCE WE WILL PUT ON.
02:16PM 12 WE WILL HAVE MULTIPLE WITNESSES TALK ABOUT, WE WILL START WITH
02:16PM 13 MR. LOUGHEED WHO IS THE FIRST ORIGINATOR OF THESE COMMANDS AND
02:16PM 14 SET UP SOME OF THE INITIAL HIERARCHIES.

02:16PM 15 MR. REMAKER WILL TESTIFY, WHO WILL TALK ABOUT THE GENERAL
02:16PM 16 PROCESS THAT APPLIES TO ALL OF THESE COMMANDS. HE WAS OUR
02:16PM 17 CORPORATE WITNESS ON THIS TOPIC.

02:17PM 18 WE WILL TESTIFY -- WE COMPILED, AS YOUR HONOR REMEMBERED
02:17PM 19 THERE WAS LONG ROG RESPONSES. WE TRACKED DOWN EVERY SINGLE
02:17PM 20 COMMAND AUTHOR WITH EVERY COMMAND WE ARE ASSERTING WITH
02:17PM 21 PUBLICATION DATES, SOURCE CODE WITH THE COMMAND INFORMATION WAS
02:17PM 22 CHECKED IN. OPERATING SYSTEM.

02:17PM 23 WE THINK ALL OF THAT IS THERE, BUT THE ISSUE IS FROM THE
02:17PM 24 CDN PERSPECTIVE, AS MR. NELSON TALKED ABOUT, JUST LIKE IN THAT
02:17PM 25 CASE THE PLAINTIFF WAS NOT REQUIRED TO COME IN, PUT UP

02:17PM 1 INDIVIDUAL OFFERS AT EVERY SINGLE PRICE AND GO THROUGH WHAT
02:17PM 2 WERE THE INDIVIDUAL, YOU KNOW, DID YOU CONSIDER 1.49 BEFORE YOU
02:17PM 3 CAME IN AT A 1.50 FOR THIS. THERE WAS NO TESTIMONY THAT WAS
02:17PM 4 THERE.

02:17PM 5 THE COURT: OKAY.

02:17PM 6 SO MY UPON DETERMINATION IN ANALYTIC DISSECTION ON
02:17PM 7 ORIGINALITY, WHICH IS PART OF WHAT I NEED TO LOOK AT, AT WHAT
02:17PM 8 LEVEL IS THAT? IS THAT AT THE LEVEL OF THIS VERY -- I DON'T
02:17PM 9 ACTUALLY KNOW IF IT ALSO GOES TO THE JURY, WHAT PASS
02:17PM 10 ORIGINALITY GETS THROUGH ANALYTIC DISSECTION.

02:17PM 11 MR. PAK: I THINK RIGHT NOW, ALL WE ARE TALKING ABOUT
02:17PM 12 IS, AS WE TALKED ABOUT, WHAT EVIDENCE DO WE FILTER OUT FOR
02:18PM 13 PRESENTATION TO THE JURY. OUR POSITION IS NOW THAT WE HAVE --

02:18PM 14 THE COURT: NO, NO, I UNDERSTAND THAT.

02:18PM 15 BUT IF I'M GOING TO DO SOME FILTERING BECAUSE IT'S
02:18PM 16 UNORIGINAL, I HAVEN'T HAD -- I MEAN, HOW CAN I DO THAT?

02:18PM 17 YOU'VE SHOWN ME THE CATEGORY OR YOUR BUILDING BLOCK, EACH
02:18PM 18 OF YOUR BUILDING BLOCKS HAD A PROCESS OF CREATION.

02:18PM 19 MR. PAK: RIGHT.

02:18PM 20 THE COURT: AND YOU THINK THAT'S ALL I NEED TO KNOW
02:18PM 21 AT THIS POINT.

02:18PM 22 MR. PAK: I THINK -- YOUR HONOR, I'M HAPPY AND I'M
02:18PM 23 PREPARED FOR THIS SECTION OF THE PRESENTATION IF YOUR HONOR
02:18PM 24 WANTS TO SEE IT.

02:18PM 25 I HAVE JUST A SAMPLING, BUT OVER 40 PAGES OF DOCUMENTS AND

02:18PM 1 TESTIMONY OR EVIDENCE ON EXACTLY THIS ISSUE OF, THIS WAS THE
02:18PM 2 PROCESS, THIS WAS USED FOR EVERY ONE OF OUR COMMANDS, HERE'S
02:18PM 3 THE POLICE MANIFESTO THAT WERE ALL GUIDELINES, THERE ARE
02:18PM 4 INCREDIBLE AMOUNTS OF DEBATE.

02:18PM 5 I HAVE TESTIMONY FROM MR. SWEENEY, MR. DUDA, MR. LOUGHEED,
02:18PM 6 ALL WHO WORKED AT CISCO. THEY WERE AUTHORS, SOME OF THEM WERE
02:18PM 7 AUTHORS OF THESE COMMANDS. THEY TESTIFIED UNDER OATH THAT THIS
02:18PM 8 WAS A SUBJECTIVE PROCESS, THAT PEOPLE HAD THE ABILITY TO PICK
02:19PM 9 WHATEVER THEY WANTED. OF COURSE THERE WERE SOME GUIDELINES
02:19PM 10 THAT WERE GIVEN, BUT THEY WERE JUST GUIDELINES.

02:19PM 11 WE HAVE ALL OF THAT, EVERYTHING THAT WE ARE PRESENTING TO
02:19PM 12 YOUR HONOR AND EVERYTHING THAT WE WILL PRESENT TO THE JURY WILL
02:19PM 13 BE COVERED BY THE PROCESS WE ARE TALKING ABOUT.

02:19PM 14 THE COURT: OKAY.

02:19PM 15 AND MR. SILBERT, ARE YOU GOING TO ARGUE THE OPPOSITE ON
02:19PM 16 THAT ISSUE OF ORIGINALITY AT ANALYTIC DISSECTION?

02:19PM 17 MR. SILBERT: ABSOLUTELY.

02:19PM 18 AND MORE THAN THAT, WE ARE GOING TO PRESENT EVIDENCE THAT
02:19PM 19 THEY DON'T KNOW THAT THE TESTIMONY INCLUDING 30(B)(6) TESTIMONY
02:19PM 20 OF THE COMPANY WAS THEY DON'T KNOW THE ACTUAL PROCESS THAT WAS
02:19PM 21 FOLLOWED FOR.

02:19PM 22 THE COURT: NOW, I NEED THE EVIDENCE, SO WHAT AM I
02:19PM 23 SUPPOSED TO DO?

02:19PM 24 MR. SILBERT: I THINK, IF I MAY, YOUR HONOR. BECAUSE
02:19PM 25 THE APPROACH WE HAVE BEEN TRYING TO TAKE ON DISSECTION, AND I

02:19PM 1 FULLY AGREE THERE ARE LINES TO BE DRAWN THAT ARE NOT ALWAYS
02:19PM 2 EXACTLY CLEAR AND WE NEED A PATH FORWARD, AND I THINK THE LINE
02:19PM 3 AT LEAST WE ARE TRYING TO DRAW HERE IS THAT SOME OF THESE
02:19PM 4 ISSUES THAT REQUIRE A DEEPER UNDERSTANDING OF THE EVIDENCE AND
02:19PM 5 WHAT THE EVIDENCE IS GOING TO SHOW, AND POTENTIALLY YOUR HONOR
02:20PM 6 WILL WANT TO SEE AND HEAR WITNESSES TESTIFY, THOSE ARE NOT FOR
02:20PM 7 YOU TO TRY TO DO NOW BEFORE TRIAL.

02:20PM 8 THE COURT: OKAY. SO I'M GOING TO IGNORE ORIGINALITY
02:20PM 9 RIGHT NOW.

02:20PM 10 MR. SILBERT: WELL, I DON'T KNOW THAT YOU WILL IGNORE
02:20PM 11 IT EVERY FLAVOR OF ORIGINALITY IN EVERY RESPECT, BUT I THINK ON
02:20PM 12 ISSUES LIKE THE ONE YOU JUST RAISED AND MR. PAK WAS DISCUSSING,
02:20PM 13 I THINK THAT PARTICULAR, YOU DO NEED TO HEAR THE EVIDENCE AND
02:20PM 14 SEE IT, AND THERE IS LIKELY TO BE MOTION PRACTICE ON IT WHEN
02:20PM 15 CISCO RESTS ITS CASE.

02:20PM 16 MR. NELSON: SO HERE'S A LITTLE BIT ON THAT,
02:20PM 17 YOUR HONOR.

02:20PM 18 I MEAN, WE CAN GO THROUGH, AND I THINK I KNOW WHAT HE'S
02:20PM 19 TALKING ABOUT, QUESTIONS LIKE, DO YOU KNOW WHAT WAS IN THE MIND
02:20PM 20 OF EACH INDIVIDUAL AUTHOR, WHICH I DON'T THINK IS REALLY THE
02:20PM 21 RIGHT QUESTION TO BE ASKING.

02:20PM 22 BUT REALLY WHAT THAT GETS DOWN TO IS, IS IT THE CASE THEN
02:20PM 23 IN EVERY COPYRIGHT CASE THAT YOU GO THROUGH EVERY ELEMENT LINE,
02:20PM 24 BY LINE, BY LINE, THAT'S THE PRECEDENT THEY ARE ASKING FOR.
02:20PM 25 THAT'S WHAT WE TRIED TO AVOID. AND THAT'S WHAT CDN SAYS YOU

02:21PM 1 DON'T HAVE TO DO.

02:21PM 2 SO WHAT THEY ARE ASKING YOU TO DO YOUR HONOR IS REALLY, I
02:21PM 3 DON'T KNOW HOW CAN YOU DO YOUR JOB, I MEAN, WHEN YOU TALK
02:21PM 4 ABOUT --

02:21PM 5 THE COURT: OH, I CAN DO MY JOB, BUT YOUR TRIAL IS
02:21PM 6 GOING TO BE IN MAY. IT'S ACTUALLY VERY SIMPLE.

02:21PM 7 MR. NELSON: THAT'S WHAT I'M SAYING. REASONABLY
02:21PM 8 SPEAKING, YOU CAN'T DEVOTE THAT MUCH TIME TO ONE CASE.

02:21PM 9 THE COURT: EVEN IF I USED EVERY WAKING MINUTE UNTIL
02:21PM 10 THE JURY COMES BACK, I COULD NOT DO THIS JOB IN THE FEW DAYS
02:21PM 11 LEFT.

02:21PM 12 MR. NELSON: CORRECT.

02:21PM 13 THE COURT: SO IT'S A FRUSTRATION OF MINE OF HAVING
02:21PM 14 THIS PUT, AND THEN YOU SAY THERE MAY BE MOTION PRACTICE, BUT
02:21PM 15 JUST WHEN WOULD THAT BE? WE ARE UP AGAINST A HARD DEADLINE
02:21PM 16 HERE.

02:21PM 17 IT'S GREAT THERE WILL BE MOTION PRACTICE, BUT MOTION
02:21PM 18 PRACTICE THAT ENDS UP IN A NEW TRIAL, I DON'T WANT TO PLANT THE
02:21PM 19 SEEDS FOR A NEW TRIAL NOW, I WOULD LIKE TO LET THIS JURY GO
02:21PM 20 HOME AND WISH THEM HAPPY HOLIDAYS AND DO THIS MORE ORDERLY.

02:21PM 21 SO I'M VERY CONCERNED THAT THIS HASN'T BEEN -- THAT WE ARE
02:21PM 22 HERE AND I NEED -- AND THIS PROCESS IS SO, UNFORTUNATELY IN THE
02:21PM 23 LAW, FRANKLY ILL DEFINED, EVEN THOUGH THERE ARE LOTS OF CASES.

02:22PM 24 AND SO I'M JUST TRYING -- I AM TRYING TO DO MY JOB, I'M
02:22PM 25 TRYING TO UNDERSTAND WHAT TO DO WITHOUT GLOSSING OVER THE

02:22PM 1 ISSUES THAT ARISTA RAISES.

02:22PM 2 AND THAT'S -- THAT IS MY FEAR IS THAT I'LL, OUT OF
02:22PM 3 NECESSITY OF TIME, RULE AT TOO HIGH A LEVEL AND HENCE DEPRIVE
02:22PM 4 ARISTA OF THE RULINGS IT'S ENTITLED TO.

02:22PM 5 MR. NELSON: AND THAT I UNDERSTAND.

02:22PM 6 AND I'M, AND -- BUT I DON'T, YOU KNOW, IN ANY KIND OF
02:22PM 7 COMPUTER CODE OR UI CASE OR MAYBE THERE'S SOME THAT ARE --
02:22PM 8 THERE'S GOING TO BE SO MANY ELEMENTS, RIGHT.

02:22PM 9 AND THE WAY THESE WORKED FOR HIGHER, FOR LACK OF -- I THINK
02:22PM 10 THAT ACTUALLY IS THE RIGHT TERM YOU ARE COMPREHENDING, I'M NOT
02:22PM 11 HUNDRED PERCENT SURE. BUT YOU HAVE A LOT, A LOT, A LOT OF
02:22PM 12 PEOPLE OVER MANY, MANY YEARS WORKING ON THESE KINDS OF THINGS.

02:22PM 13 AND SO YOU HAVE TESTIMONY ABOUT HERE'S YOUR PROCESS THAT
02:22PM 14 THE COMPANY WENT THROUGH, THIS IS WHAT WE DO, OBVIOUSLY IT
02:22PM 15 IS -- IT IS IMPOSSIBLE, I MEAN, I THINK IS THE ONLY WORD THAT I
02:23PM 16 COULD USE, THAT YOU COULD GO BACK TO EVERY SINGLE PERSON.

02:23PM 17 THE COURT: YEAH.

02:23PM 18 MR. NELSON: WHO WROTE A LINE OF CODE, WROTE A MODULE
02:23PM 19 OF CODE, IF WE ARE TALKING ABOUT CODE HERE, OR WROTE A COMMAND
02:23PM 20 IN THE UI OR DID THIS AND SAID, I RECALL 22 YEARS AGO THAT
02:23PM 21 THESE ARE EXACTLY THE CONSIDERATIONS I HAD. IT'S NOT POSSIBLE.

02:23PM 22 THE COURT: NO.

02:23PM 23 MR. NELSON: SO THAT CAN'T BE THE ANSWER.

02:23PM 24 THE COURT: PLUS THE TRIAL WOULD BE SIX MONTHS LONG.

02:23PM 25 MR. NELSON: AT LEAST, AT LEAST SIX MONTHS LONG.

02:23PM 1 AND THAT'S WHY CDN TELLS YOU THAT YOU'VE GOT TO LOOK AT THE
02:23PM 2 PROCESS. BECAUSE IT WOULD BE THE SAME THING THERE.

02:23PM 3 IF YOU ARE TO DO WHAT THEY ARE ASKING YOU TO DO, THE CDN
02:23PM 4 CASE WOULD HAVE COME OUT AND SAID, PUT EACH OF THOSE INDIVIDUAL
02:23PM 5 EXPERTS, THE PEOPLE THAT WENT OUT AND FIGURED OUT THE COIN
02:23PM 6 PLACES, LET'S SAY WHAT DID YOU LOOK AT, DID YOU LOOK AT THIS,
02:23PM 7 WHAT WERE THE MARKET PRESSURES WHAT OTHER THINGS DID YOU LOOK
02:23PM 8 AT? HOW DID YOU COME UP WITH THIS PRICE, AND WE WOULD HAVE HAD
02:23PM 9 THAT TESTIMONY ON EACH INDIVIDUAL ELEMENT?

02:23PM 10 THERE'S NO WAY. YOU CAN'T DO THAT AS A PRACTICAL MATTER IN
02:24PM 11 THE CASE, THAT CAN'T POSSIBLY BE THE LAW.

02:24PM 12 AND THAT'S WHY I AGREE WE HAVE TO HAVE SOME TESTIMONY, AND
02:24PM 13 WE HAVE TO HAVE THAT ON THE PROCESS, WE NEED TO HAVE THAT OUT
02:24PM 14 THERE, AND YOU NEED TO BE ABLE TO FILTER OUT ELEMENTS WHERE YOU
02:24PM 15 SAY, OKAY, YOU KNOW, WE HAVE THE IDEA OF A COMMAND LINE USER
02:24PM 16 INTERFACE, WE ARE GOING TO ASSERT THAT, THEN THEY CAN ARGUE
02:24PM 17 ABOUT IT, THE JURY CAN GET CONFUSED, AND YOU WILL SAY WELL,
02:24PM 18 WAIT A MINUTE, COME ON GUYS, THOSE WAY PREEXIST YOU, JUST
02:24PM 19 DECIDING TO DO THAT, THAT'S NOT SOMETHING YOU DO.

02:24PM 20 THAT'S WHAT FILTRATION IS, RIGHT, THAT'S WHAT WE ARE
02:24PM 21 TALKING ABOUT IS TRYING TO BE THE GATE KEEPER WITH THAT, NOT
02:24PM 22 TRYING TO BE THE ARBITER AT EVERY SINGLE LEVEL BECAUSE
02:24PM 23 YOUR HONOR CAN'T DO HER JOB.

02:24PM 24 THE COURT: WELL, I GREATLY APPRECIATE THAT OVER THE
02:24PM 25 COURSE OF THE LAST COUPLE OF MONTHS THAT CISCO HAS ACTUALLY

02:24PM 1 ARTICULATED THE ELEMENTS THAT ARE NOT SEEKING PROTECTION OF AND
02:24PM 2 YOU'VE WRITTEN THEM DOWN AND YOU'VE COMMITTED TO THEM. SO I
02:24PM 3 APPRECIATE THAT. AND IN FACT, IT RESPONDED VERY DIRECTLY TO
02:25PM 4 SOME OF THE EARLY ARGUMENTS THAT WERE ASSERTED BY ARISTA.

02:25PM 5 AND SO ALTHOUGH I MIGHT NOT ULTIMATELY AGREE THAT YOU'VE
02:25PM 6 DONE ALL OF IT, I THINK YOU'VE COME A LONG WAY. AND THAT'S
02:25PM 7 WHAT IT SHOULD BE. AND SO I REALLY CREDIT CISCO WITH DOING
02:25PM 8 THAT. AND THEN WE GET THE REST OF THE WAY.

02:25PM 9 MR. NELSON: YES. I AGREE, YOUR HONOR.

02:25PM 10 THE COURT: ALL RIGHT. OKAY. WELL, LET ME HEAR FROM
02:25PM 11 MR. SILBERT.

02:25PM 12 I AM REALLY LOOKING FOR, MR. SILBERT, TO THE EXTENT THAT I
02:25PM 13 FILTER OUT ANYTHING, I REALLY NEED A CLEAR ARTICULATION OF WHY
02:25PM 14 I WOULD BE TAKING THIS OUT. BECAUSE MR. NELSON IS REALLY
02:25PM 15 GIVING ME A MUCH, SORT OF A HIGHER LEVEL VIEW OF EACH OF THESE
02:25PM 16 ELEMENTS.

02:25PM 17 MR. SILBERT: ABSOLUTELY. AND WITH THE COURT'S
02:25PM 18 PERMISSION, WE ARE GOING TO SPLIT UP THE DIFFERENT ASPECTS.
02:25PM 19 MR. NELSON COVERED A LOT OF TERRITORY THERE.

02:25PM 20 THE COURT: YES, HE DID.

02:25PM 21 MR. SILBERT: AND UNLESS YOUR HONOR HAS A DIFFERENT
02:25PM 22 PREFERENCE IN TERMS OF ORDER, I AM GOING TO ADDRESS INDUSTRY
02:26PM 23 STANDARD TERMINOLOGY AND THE USE OF THAT TERMINOLOGY AND WHAT
02:26PM 24 IT MEANS TO USE THAT TERMINOLOGY IN CLI COMMANDS.

02:26PM 25 THE COURT: AND JUST SO THAT I'M CLEAR ON THIS, WHEN

02:26PM 1 YOU SAY INDUSTRY STANDARD TERMINOLOGY, THAT IS AS IT EXISTED AT
02:26PM 2 THE TIME OF CREATION BY CISCO?

02:26PM 3 MR. SILBERT: RIGHT.

02:26PM 4 SO LET'S BE CLEAR ABOUT -- EXACTLY. YOUR HONOR MADE THAT
02:26PM 5 CLARIFICATION EARLIER, AND LET'S BE CLEAR THAT THAT'S WHAT I'M
02:26PM 6 TALKING ABOUT.

02:26PM 7 I'M TALKING ABOUT TERMINOLOGY THAT WAS TAKEN FROM AN
02:26PM 8 EXISTING PUBLICATION OF AN INDUSTRY STANDARD, OF AN INDUSTRY
02:26PM 9 STANDARD BODY AT THE TIME THE COMMAND WAS SUPPOSEDLY CREATED
02:26PM 10 BUT BEFORE THE TIME THE COMMAND WAS SUPPOSEDLY CREATED.

02:26PM 11 NOW THERE ARE ALSO CERTAIN OF THESE TERMS THAT, I DON'T
02:26PM 12 THINK THERE'S ANY DISPUTE, AND IF THERE IS, THAT PARTICULAR
02:26PM 13 TERM OBJECTION BE THE SUBJECT OF DISPUTE. BUT A TERM LIKE HOST
02:26PM 14 TO REFER TO A DEVICE IN A NETWORK. YOU COULD FIND IT IN
02:26PM 15 STANDARDS, IT WAS SIMPLY THE WAY THE PEOPLE IN THE INDUSTRY
02:27PM 16 TALKED ABOUT IT. THERE'S ADMISSIONS ON BOTH SIDES FROM BOTH
02:27PM 17 WITNESSES ABOUT THAT.

02:27PM 18 SO IT'S SIMPLY -- I COULD CALL IT AN INDUSTRY TERM OR
02:27PM 19 SOMETHING OF THAT NATURE THAT WAS AN EXISTING TERM THAT
02:27PM 20 EVERYBODY KNEW AND USED.

02:27PM 21 AND I DO WANT TO TALK ABOUT THIS ISSUE AT A HIGH LEVEL AND
02:27PM 22 SPECIFICALLY AT THE LEVEL THAT YOUR HONOR ASKED ABOUT WHICH IS
02:27PM 23 KIND OF HOW DO YOU DISCHARGE YOUR RESPONSIBILITIES BUT YET HAVE
02:27PM 24 A MANAGEABLE PROCESS, THAT'S SOMETHING THAT YOU COULD MAKE
02:27PM 25 REASONABLE DECISIONS ABOUT IN THE TIME THAT WE HAVE. THE JURY

02:27PM 1 CAN MAKE THE DECISIONS THAT THE JURY NEEDS TO MAKE BUT THE JURY
02:27PM 2 IS NOT GOING TO BE CONFUSED AND ITS ACTUAL TASK IS LAID OUT FOR
02:27PM 3 IT IN A CLEAR WAY.

02:27PM 4 AND I THINK THE STARTING POINT FOR THINKING ABOUT THAT IS
02:27PM 5 THE HARBOR HOUSE CASE, AND THERE'S OTHER CASES AS WELL THAT GET
02:27PM 6 AT THIS POINT, BUT THE HARBOR HOUSE CASE, NINTH CIRCUIT CASE
02:27PM 7 MAKES CLEAR IS IT TALKS ABOUT THE INFLAMMATORY NATURE OF AN
02:28PM 8 ALLEGATION OF COPYING. AND THE RISK OF PREJUDICE AND CONFUSION
02:28PM 9 THAT ARISES IF THE JURY HEARS THEY COPIED, THEY COPIED, THEY
02:28PM 10 COPIED, BUT THEY ARE NOT CLEARLY TOLD SOME OF THESE THINGS THAT
02:28PM 11 THEY ARE ALLEGED TO HAVE COPIED ARE NOT PROTECTABLE AND
02:28PM 12 THEREFORE IT WAS FINE FOR THEM TO COPY, PERFECTLY LEGAL.
02:28PM 13 NOTHING WHATSOEVER WRONG WITH IT, THAT'S JUST THE WAY THE WORLD
02:28PM 14 WORKS, BUSINESS WORKS.

02:28PM 15 SO I THINK UNDER THAT FRAMEWORK, THE QUESTION IS WHAT IS IT
02:28PM 16 YOU CAN DO AND SHOULD DO NOW? WHAT DECISIONS CAN YOU MAKE NOW,
02:28PM 17 AND WHAT DECISIONS -- THERE MAY BE MORE THAT AFTER YOU HEAR THE
02:28PM 18 EVIDENCE YOU WILL DO MORE, AND THERE'S GOING TO BE SOME SET OF
02:28PM 19 ISSUES THAT ARE LEFT TO THE JURY THAT THE JURY IS GOING TO HAVE
02:28PM 20 TO DECIDE AT THE END OF THE DAY.

02:28PM 21 SO WITHIN THAT FRAMEWORK, THE ISSUE OF TERMS THAT WERE
02:28PM 22 TAKEN FROM INDUSTRY STANDARDS. AND AGAIN, TO BE CLEAR,
02:28PM 23 PRE-EXISTING STANDARDS, PUBLICATIONS OF STANDARDS BODIES THAT
02:29PM 24 EXISTED, TERMS THAT WERE IN WIDESPREAD USE AS NAMES OF THINGS.

02:29PM 25 THE COURT: AND ARE YOU TALKING ABOUT INDIVIDUAL

02:29PM 1 WORDS?

02:29PM 2 MR. SILBERT: YES.

02:29PM 3 THE COURT: BECAUSE DR. BLACK DECIDED THEM TWO
02:29PM 4 INDIVIDUAL WORDS.

02:29PM 5 CISCO IS NOT CLAIMING PROTECTABILITY ON INDIVIDUAL WORDS.
02:29PM 6 WE HAVE AGREEMENT ON THAT.

02:29PM 7 MR. SILBERT: THEY ARE NOT CLAIMING PROTECTABILITY OF
02:29PM 8 THE INDIVIDUAL WORDS.

02:29PM 9 AND I THINK TO CLARIFY TO THE JURY THE ISSUES HERE AND WHAT
02:29PM 10 THEY NEED THAT DO, THERE'S ONE ADDITIONAL THING THAT NEEDS TO
02:29PM 11 BE MADE CLEAR TO THEM, AND THAT IS THAT THE USE OF A -- THE
02:29PM 12 NAME TAKEN FROM A STANDARD.

02:29PM 13 FOR EXAMPLE, TO CALL THE OSPF STANDARD PROTOCOL OSPF, THAT
02:29PM 14 BY ITSELF IS NOT AN ORIGINAL OR CREATIVE ACT. IT'S SIMPLY NOT.
02:29PM 15 IT'S THE NAME BY WHICH EVERYONE IN THE INDUSTRY KNOWS THAT
02:29PM 16 PROTOCOL. EVERYBODY REFERS TO IT BY THAT NAME.

02:29PM 17 THE COURT: AND AGAIN, I DON'T THINK THAT'S IN
02:30PM 18 DISPUTE.

02:30PM 19 MR. SILBERT: OKAY. GREAT.

02:30PM 20 AND THEN THE ISSUE THEN IS HOW TO CLARIFY TO THE JURY THAT
02:30PM 21 USING A NAME THAT IS ALREADY AN INDUSTRY NAME, AN INDUSTRY
02:30PM 22 TERMINOLOGY, USING THAT NAME ITSELF IS NOT CREATIVE, HOWEVER, A
02:30PM 23 COMBINATION COULD BE.

02:30PM 24 THEY CAN ARGUE, AND THAT'S, AS I UNDERSTAND THE ARGUMENT
02:30PM 25 THAT THEY'RE MAKING, IS THAT MAYBE IF WE CALL OSPF, OSPF, OR WE

02:30PM 1 CALL IP, IP, THERE'S NOTHING CREATIVE OR ORIGINAL ABOUT THAT.

02:30PM 2 BUT WE COULD -- BUT WHEN WE STRING THESE THINGS TOGETHER,
02:30PM 3 WHEN WE SAY IP ADDRESS OR WHATEVER IT IS THAT THEY SAY, THAT
02:30PM 4 THAT'S A CREATIVE ACT.

02:30PM 5 AND I THINK WHAT WE NEED IS, BECAUSE ALL OF THIS COMES DOWN
02:30PM 6 TO JURY INSTRUCTIONS AT THE END OF THE DAY --

02:30PM 7 THE COURT: AND AGAIN, I ACTUALLY BELIEVE THAT
02:30PM 8 THROUGH YOUR ARGUMENT, THROUGHOUT THE CASE AND CISCO'S
02:30PM 9 REFLECTION ON HOW IT WANTS TO PRESENT ITS OWN, YOU HAVE COME TO
02:30PM 10 A LARGE AMOUNT OF AGREEMENT ON THIS.

02:30PM 11 SO I ACTUALLY THINK YOU KIND OF OWN THIS ARGUMENT ALREADY.
02:31PM 12 AND THANKS TO THE CONCESSION. BUT I AGREE WITH YOU COMPLETELY.
02:31PM 13 AND EVEN, FRANKLY, EVEN THE FEW INDIVIDUAL WORDS THAT CISCO MAY
02:31PM 14 HAVE CLAIMED IT INVENTED THAT MR. NELSON SHOWED ME, THEY'RE
02:31PM 15 STILL NOT CLAIMING PROTECTABILITY OF THE WORD BY ITSELF
02:31PM 16 STANDING ALONE.

02:31PM 17 SO THE CREATIVE ASPECT IS LIMITED TO THE DEVELOPING OF THE
02:31PM 18 COMBINATION.

02:31PM 19 MR. SILBERT: CORRECT.

02:31PM 20 THE COURT: AND IN YOUR PAPERS, YOU AGREE SUBJECT TO
02:31PM 21 MERGER AND SCÈNES À FAIRE THAT --

02:31PM 22 MR. SILBERT: WELL, WE WOULD SAY WE AGREE THAT'S WHAT
02:31PM 23 THEY ALLEGE. WE ARE NOT AGREEING THAT THE COMBINATION WAS
02:31PM 24 CREATIVE, CERTAINLY.

02:31PM 25 THE COURT: YOU ARE ONLY CLAIMING THAT'S A

02:31PM 1 PROTECTABLE ELEMENT. THEY STILL HAVE TO PROVE THAT CREATIVITY.

02:31PM 2 MR. SILBERT: RIGHT. EXACTLY.

02:31PM 3 AND SO I THINK YOUR HONOR ASKED A QUESTION ABOUT, CAN YOU
02:31PM 4 THINK OF THE COMMAND AS A COMPILATION, AND I THINK THAT IS A
02:31PM 5 USEFUL WAY TO THINK ABOUT IT UNDER THE FRAMEWORK OF THE FICE
02:32PM 6 CASE, FOR EXAMPLE, WHERE USING THE NAME OF A PROTOCOL SUCH AS
02:32PM 7 OSPF OR IP, OR USING THE TERM VRRP OR ANY NUMBER OF THESE OTHER
02:32PM 8 TERMS THAT, TO US, MAKE OUR HEAD SPIN BECAUSE WE DON'T LIVE IN
02:32PM 9 THIS WORLD AND WE SEE THEM, I SEE THEM AND IT LOOKS LIKE GREEK
02:32PM 10 AND I THINK, OH MY GOSH, IT'S AN ENTIRELY NEW LANGUAGE THAT I'M
02:32PM 11 SEEING HERE, IT'S COMPLETELY UNLIKE ANYTHING I'VE EVER SEEN,
02:32PM 12 WHAT DOES IT ALL MEAN.

02:32PM 13 AND I THINK WHAT THE JURY NEEDS TO BE TOLD IS THAT USE OF
02:32PM 14 THOSE ACRONYMS, TERMS THAT ARE DEFINED IN PUBLISHED DOCUMENTS,
02:32PM 15 TERMS THAT, PARAMETERS THAT HAVE A PARTICULAR NAME IN A
02:32PM 16 PUBLISHED DOCUMENT WHERE THAT NAME IS THEN USED AGAIN IN A CLI
02:32PM 17 COMMAND, THAT THE USE OF THAT TYPE OF INDUSTRY TERMINOLOGY BY
02:32PM 18 ITSELF, THE USE OF THOSE WORDS BY ITSELF IS NOT A CREATIVE ACT,
02:33PM 19 ORIGINAL ACT.

02:33PM 20 THE COURT: SO FICE, I ALWAYS LIKE IT BECAUSE IT'S A
02:33PM 21 PHONE BOOK AND WE ALL KNOW WHAT THAT IS. BUT IN FICE THEY WERE
02:33PM 22 FACTUAL. THE INDIVIDUAL PIECES WERE FACTUAL.

02:33PM 23 SO HERE IT'S SOMETHING ELSE. BUT LET'S JUST -- IF EACH OF
02:33PM 24 THE WORDS THAT MAKES UP THE LINE OR THE ENTIRE BODY OF COMMANDS
02:33PM 25 IS NOT SUBJECT TO PROTECTION, THEN THE PROCESS THAT MR. NELSON

02:33PM 1 DESCRIBES AND THAT CISCO HAS TALKED ABOUT IS CREATING THE
02:33PM 2 COMBINATIONS, IS.

02:33PM 3 MR. SILBERT: RIGHT.

02:33PM 4 THE COURT: AND THAT'S WHAT WE ARE SENDING TO THE
02:33PM 5 JURY.

02:33PM 6 MR. SILBERT: RIGHT.

02:33PM 7 THE COURT: OKAY. I DON'T THINK WE HAVE DISAGREEMENT
02:33PM 8 ON THAT.

02:33PM 9 AND I THINK ON THE COMMAND LINES, NOW YOU GO ON TO THE
02:33PM 10 ARGUMENT ABOUT THE TWO-WORD AND THE THREE-WORD, PRIMARILY. AND
02:33PM 11 YOU HAVE THE AUTHORSHIP ISSUE.

02:33PM 12 SO WHERE DOES THAT ALL PLAY IN HERE?

02:33PM 13 MR. SILBERT: WELL, AND THIS IS KIND OF WHERE I
02:33PM 14 STARTED THIS MORNING AND MAYBE WE WOULD GO SOMEWHERE DIFFERENT,
02:33PM 15 BUT WE SPENT THE BETTER PART OF THE LATE MORNING AND THE EARLY
02:34PM 16 AFTERNOON LOOKING AT A COUPLE OF EXAMPLES. AND THAT WAS ONLY
02:34PM 17 ONE SIDE. THAT WAS ONLY THE CISCO SIDE OF THAT ARGUMENT.

02:34PM 18 THE COURT: SURE.

02:34PM 19 MR. SILBERT: I THINK OUR BELIEF IS THAT TO THE
02:34PM 20 EXTENT THAT YOUR HONOR NEEDS TO HEAR ABOUT THE PARTICULAR
02:34PM 21 FEATURES OF THE COMBINATION OF TWO WORDS, I MEAN, YOU CAN HAVE
02:34PM 22 A REACTION TO SET CLOCK.

02:34PM 23 THEY SAY OH, WELL YOU COULD USE SOMETHING ELSE, THERE'S 15
02:34PM 24 DIFFERENT COMPANIES, AT LEAST, WHO SAY SET CLOCK, THE
02:34PM 25 IDENTICAL, BUT MAYBE YOU COULD.

02:34PM 1 BUT IT'S GOING TO BE THE SAME, I THINK WHEN YOU HEAR THE
02:34PM 2 EVIDENCE, IT'S GOING TO BE THE SAME FOR IP ADDRESS AND MANY,
02:34PM 3 MANY OTHER COMBINATIONS. BUT I THINK, MY BELIEF IS TO TRY TO
02:34PM 4 DO THAT NOW ON --

02:34PM 5 THE COURT: SO HOW DO I DO THAT -- SO I CAN'T -- IT
02:34PM 6 WOULD BE NICE IF THE LAW JUST SAID TWO WORDS NEVER COUNTS OR
02:34PM 7 THREE WORDS NEVER COUNTS, THAT WOULD BE GREAT AND LIFE WOULD BE
02:34PM 8 EASY, BUT IT DOESN'T.

02:35PM 9 SO WHAT DO I LOOK AT TO AGREE WITH YOU?

02:35PM 10 LET'S JUST TAKE THE TWO WORDS, WE WILL START WITH THE
02:35PM 11 SIMPLEST ONE, WHAT IS IT THAT PERSUADES ME UNDER THE LAW THAT I
02:35PM 12 CAN FILTER OUT THE TWO-WORD PHRASES?

02:35PM 13 MR. SILBERT: I THINK YOU ARE GOING TO SEE THAT THOSE
02:35PM 14 TWO-WORD PHRASES CONSIST OF A COMBINATION OF WORDS THAT ARE
02:35PM 15 EASILY RELATED TO EACH OTHER, NATURALLY RELATED TO EACH OTHER.

02:35PM 16 THE COURT: I CAN'T DO THAT HERE THAT TAKES AN
02:35PM 17 EVIDENTIARY HEARING. I'M TRYING TO SEPARATE OUT SO THAT I KNOW
02:35PM 18 WHAT I NEED TO DECIDE TODAY AND TOMORROW.

02:35PM 19 MR. SILBERT: YES.

02:35PM 20 THE COURT: SO IF YOU TELL ME THAT'S FOR THE HEARING
02:35PM 21 FOR THE TRIAL, GOOD, SO THIS.

02:35PM 22 MR. SILBERT: THAT'S WHAT I'M SUGGESTING IS THAT'S
02:35PM 23 FOR THE TRIAL TO TRY TO DO IT -- TO GO THROUGH PARTICULAR
02:35PM 24 COMBINATIONS OF TWO-WORD PHRASES NOW IS NOT REALLY FEASIBLE.
02:35PM 25 SO THAT'S FOR THE TRIAL.

02:35PM 1 THE COURT: SO I'M LOOKING -- AND AGAIN, I JUST -- AT
02:36PM 2 THE ISSUES THAT YOU ALL AGREED THEY COULD DECIDE, YOU SAID UN
02:36PM 3 PROTECTABLE WORDS AND SHORT PHRASES COULD BE DECIDED WITHOUT A
02:36PM 4 HEARING.

02:36PM 5 MR. SILBERT: WE DID. BUT I THINK WE HAD A CAVEAT IN
02:36PM 6 THERE THAT WAS SUBJECT TO CISCO'S ARGUMENT.

02:36PM 7 AND I SHOULD SAY FOR THE RECORD, YOUR HONOR, OUR BELIEF
02:36PM 8 WOULD BE THAT AT LEAST IN THE CASE OF TWO WORDS, AND I
02:36PM 9 UNDERSTAND THIS ISN'T YOUR HONOR'S VIEW OF THE LAW, BUT FOR THE
02:36PM 10 RECORD, OUR VIEW WOULD BE AT LEAST IN THE CASE OF A TWO-WORD
02:36PM 11 PHRASE, IT IS NOT PROTECTABLE.

02:36PM 12 AND WE DO, I WILL NOTE, HAVE THE DISTINCT ELEMENT HERE THAT
02:36PM 13 CISCO IS ALLEGING INDIVIDUAL PROTECTION FOR EACH ONE OF THESE
02:36PM 14 PHRASES. WHEN IT MIGHT BE A COMPILATION OF WORDS TO MAKE THE
02:36PM 15 PHRASE, BUT WHEN IT COMES TO EACH PHRASE, THEY HAVE BEEN VERY
02:36PM 16 CLEAR ON THE RECORD, TO MY KNOWLEDGE THEY NEVER RETRACTED THIS,
02:36PM 17 THAT THEIR ARGUMENT IS THAT EACH INDIVIDUAL PHRASE, INCLUDING
02:37PM 18 TWO-WORD PHRASES, IS INDIVIDUALLY PROTECTABLE.

02:37PM 19 OUR READING OF THE LAW, I MEAN, WORDS IN SHORT PHRASES,
02:37PM 20 THERE'S NO PHRASE THAT'S NOT AT LEAST TWO WORDS. A PHRASE IS
02:37PM 21 AT LEAST TWO WORDS.

02:37PM 22 SO OUR VIEW WOULD BE, AND I GUESS TO ACKNOWLEDGE, THERE ARE
02:37PM 23 CASES WHICH SAY THERE IS NO CUTOFF POINT. THERE'S NO NUMERICAL
02:37PM 24 CUTOFF.

02:37PM 25 THE WAY THAT I READ THOSE CASES IS THEY ARE SAYING IT'S

02:37PM 1 NOT, YOU KNOW, YOU CAN'T SAY THAT ANY 10-WORD PHRASE,
02:37PM 2 ET CETERA, IS TOO SHORT BECAUSE THERE COULD BE EXCEPTIONS.

02:37PM 3 BUT I THINK WHEN YOU GET TO A TWO-WORD PHRASE, IT'S EITHER
02:37PM 4 CATEGORICALLY OUT OR CISCO WOULD NEED TO SHOW SOME VERY
02:37PM 5 CONVINCING TYPE OF PROOF OF ORIGINALITY OR OTHER BASIS OF
02:37PM 6 PROTECTABILITY FOR THAT --

02:37PM 7 THE COURT: WELL AGAIN, STILL GETTING BACK TO, YOU
02:37PM 8 BOTH SAID I COULD DO IT WITHOUT A HEARING, AND NOW YOU ARE
02:37PM 9 GIVING ME THE ROAD MAP TO DISPUTED EVIDENCE.

02:37PM 10 MR. SILBERT: YEAH, BECAUSE --

02:38PM 11 THE COURT: SO IT MEANS I CAN'T DECIDE THIS.

02:38PM 12 MR. SILBERT: MAYBE WE WERE A LITTLE ASPIRATIONAL IN
02:38PM 13 THAT HOPE. BUT WE DID HOPE THAT.

02:38PM 14 BUT I THINK IN SEEING HOW -- AND YOU KNOW, WE FILED
02:38PM 15 SIMULTANEOUS BRIEFS, BUT WE DIDN'T KNOW WHAT CISCO'S RESPONSE
02:38PM 16 WAS GOING TO BE.

02:38PM 17 THE COURT: YOU DID. BUT WHAT I'M REALLY LOOKING AT
02:38PM 18 IS THE JOINT SUBMISSION REGARDING ANALYTIC DISSECTION CATEGORY
02:38PM 19 SUITABLE FOR DECISION WITHOUT EVIDENTIARY HEARING WHICH
02:38PM 20 PERTAINED TO YOUR RESPONSE TO CISCO'S SUBMISSION OF PROTECTABLE
02:38PM 21 ELEMENTS.

02:38PM 22 SO I'M JUST WALKING THROUGH IT. YOU SAID I COULD DO THIS
02:38PM 23 WITHOUT A HEARING AND YET IT'S CLEAR THAT I CAN'T.

02:38PM 24 MR. SILBERT: WE SAID YOU COULD, AND I CAN PULL THAT
02:38PM 25 PLEADING, BUT I BELIEVE WHAT WE SAID WAS SUBJECT TO, WE BELIEVE

02:38PM 1 YOU CAN, AND WE HAD A FOOTNOTE THAT SAID SUBJECT TO SEEING WHAT
02:38PM 2 KIND OF EVIDENCE CISCO SUBMITS IN RESPONSE, IT'S POSSIBLE THAT
02:38PM 3 SOME OF THIS WILL REQUIRE --

02:38PM 4 THE COURT: I DON'T HAVE ANY FOOTNOTE HERE. I'M JUST
02:38PM 5 LOOKING AT THE DOCUMENT THAT IDENTIFIED THE ISSUES.

02:38PM 6 MR. SILBERT: IN ANY EVENT, BUT YOUR HONOR, THE POINT
02:39PM 7 YOUR HONOR IS MAKING IS ABSOLUTELY RIGHT. WE SAID THAT IN THE
02:39PM 8 BRIEF. WE HOPED THAT IT COULD. I'M STANDING HERE TODAY
02:39PM 9 TELLING YOU WHAT THE WAY THINGS PLAYED OUT AND WHERE WE ARE
02:39PM 10 NOW, I DON'T THINK IT'S FEASIBLE TO TRY TO GO THROUGH THOSE.

02:39PM 11 THE COURT: OKAY. THAT'S FINE.

02:39PM 12 AND THEN YOUR NEXT CATEGORY WAS CONVENTIONAL COMMAND SYNTAX
02:39PM 13 THAT CISCO COPIED FROM OTHER SOURCES.

02:39PM 14 AND THIS ONE I THINK HAS BEEN AGREED THAT SYNTAX IS NOT
02:39PM 15 BEING SOUGHT.

02:39PM 16 MR. SILBERT: AGREED.

02:39PM 17 THE COURT: OKAY. AND THEN RECORDED SELECTION OR
02:39PM 18 ARRANGEMENT OF COMMANDS THAT IS NOT GROUNDED IN CISCO'S ACTUAL
02:39PM 19 WORKS OR THAT CISCO DID NOT DISCLOSE IN DISCOVERY.

02:39PM 20 I MEAN, I'M INTERRUPTING YOUR PRESENTATION.

02:39PM 21 MR. SILBERT: NO, THAT'S OKAY.

02:39PM 22 THE COURT: YOU TOLD ME THINGS I COULD DECIDE AND
02:39PM 23 THEN THE PRESENTATION ISN'T TRACKING THEM. SO I DON'T ACTUALLY
02:39PM 24 EVEN KNOW IF I'M -- I DON'T WANT TO VENTURE INTO THE AREAS THAT
02:39PM 25 YOU BOTH BELIEVE NEED AN EVIDENTIARY HEARING.

02:40PM 1 MR. SILBERT: UH-HUH.

02:40PM 2 THE COURT: AND THEN PROTECTABLE ASPECTS OF THE
02:40PM 3 HIERARCHY, I'M TAKING THE HIERARCHIES AS ALL OR NOTHING.

02:40PM 4 MR. SILBERT: THE HIERARCHY, MR. KWUN IS GOING TO
02:40PM 5 ADDRESS THEM IN A MINUTE.

02:40PM 6 THE COURT: OKAY. SO LET'S JUMP TO THAT.

02:40PM 7 MR. SILBERT: OKAY.

02:40PM 8 THE COURT: SO MR. SILBERT, WAS THERE MORE THAT YOU
02:40PM 9 WANTED TO PRESENT?

02:40PM 10 MR. SILBERT: WELL, I THINK THE ONLY -- THE LAST
02:40PM 11 POINT ABOUT IT IS FASHIONING A JURY INSTRUCTION.

02:40PM 12 AND I THINK THIS IS WHAT WE CAN DO TOMORROW. BUT IT SOUNDS
02:40PM 13 LIKE EVERYONE IS ON THE SAME PAGE WITH RESPECT TO INDIVIDUAL
02:40PM 14 WORDS FROM INDUSTRY STANDARDS.

02:40PM 15 AND I THINK WE JUST NEED, AND WE HAD PROPOSED ONE IN NUMBER
02:40PM 16 12 WHICH I UNDERSTAND YOUR HONOR HASN'T HAD THE OPPORTUNITY TO
02:40PM 17 READ, BUT --

02:40PM 18 THE COURT: I HAVEN'T LOOKED AT THE CONTRARY ONE.

02:40PM 19 MR. SILBERT: BUT AS I SAID, ULTIMATELY ALL OF THE
02:40PM 20 DISSECTION PROCESS COMES DOWN TO JURY INSTRUCTIONS. AND WE
02:40PM 21 JUST NEED TO FASHION AN APPROPRIATE JURY INSTRUCTION THAT
02:40PM 22 EXPLAINS TO THE JURY THIS IS NOT SOMETHING THAT WOULD BE IN THE
02:41PM 23 REALM --

02:41PM 24 THE COURT: OKAY. IN PLAINER ENGLISH OF, YOU ARE NOT
02:41PM 25 TO CONSIDER INDIVIDUAL WORDS, THEY ARE NOT PROTECTED.

02:41PM 1 MR. SILBERT: YES, INDIVIDUAL WORDS WITH PARTICULAR
02:41PM 2 EMPHASIS ON WORDS TAKEN FROM PRE-EXISTING INDUSTRY STANDARDS.

02:41PM 3 THE COURT: CISCO IS GIVING YOU MORE THAN YOU ARE
02:41PM 4 ASKING FOR THERE.

02:41PM 5 THEY ARE SAYING THEY ARE NOT ASKING FOR PROTECTION FOR ANY
02:41PM 6 WORD AS AN INDIVIDUAL WORD. THEY ARE NOT LIMITING IT.

02:41PM 7 I MEAN, YOU LATER MAY WANT THE JURY TO UNDERSTAND WHERE IT
02:41PM 8 COMES FROM FOR OTHER REASONS, AND THAT'S FINE. YOU ARE NOT
02:41PM 9 BEING RESTRICTED. BUT THEY ARE GIVING UP ON EVERY INDIVIDUAL
02:41PM 10 WORD.

02:41PM 11 MR. SILBERT: OKAY.

02:41PM 12 THE COURT: SO THAT'S SIMPLE FOR THE JURY.

02:41PM 13 MR. SILBERT: WE WILL TAKE IT.

02:41PM 14 MR. VAN NEST: BEFORE WE START HERE, YOUR HONOR,
02:41PM 15 THERE IS ONE OTHER THING THAT MR. SILBERT WAS GOING TO ADDRESS,
02:41PM 16 AND I DON'T CARE HOW WE DO IT, BUT MODES AND PROMPTS IS AN
02:41PM 17 ISSUE WE WANT TO TOUCH.

02:41PM 18 THE COURT: WE WERE GOING TO DO THAT --

02:41PM 19 MR. VAN NEST: ALL RIGHT.

02:41PM 20 MR. FERRALL IS GOING TO COVER MODES AND PROMPTS AND
02:41PM 21 MR. KWUN IS GOING TO COVER HIERARCHIES.

02:41PM 22 THE COURT: WE ALL AGREE THAT COMMAND RESPONSES AND
02:41PM 23 RESPECT DESCRIPTIONS FALL IN THE SAME CATEGORY AS COMMAND.
02:42PM 24 THAT'S GREAT. AND THEN THE MANUAL SOMEONE WILL MAYBE THAT'S
02:42PM 25 NOT EVEN NEEDING ANY FURTHER DISCUSSION.

02:42PM 1 OKAY. WE ARE GOING TO --

02:42PM 2 THE COURT: WE ARE GOING TO GO UNTIL THREE THEN TAKE
02:42PM 3 A BREAK. SO WHY DON'T WE GO AHEAD AND JUMP INTO HIERARCHIES
02:42PM 4 HERE.

02:42PM 5 MR. KWUN: ABSOLUTELY, YOUR HONOR.

02:42PM 6 I JUST WANTED TO READ A LITTLE BIT FROM THE APPLE V.
02:42PM 7 MICROSOFT CASE, THE ACTUAL DISSECTION OPINION FROM JUDGE
02:42PM 8 WALKER. IT HAS SOME BACKGROUND THAT I THINK IS USEFUL TO KEEP
02:42PM 9 IN MIND. AND WHETHER THAT'S FOR TODAY OR FOR LATER ON, IT'S
02:42PM 10 JUST VERY SHORT.

02:42PM 11 THE COURT: WHICH ONE OF THEM, SO IF I WANT TO GO
02:42PM 12 BACK TO IT?

02:42PM 13 MR. KWUN: THE 799 F.SUPP, 1006. I'M READING FROM
02:42PM 14 PAGE 1025, AND I WILL READ A LITTLE BIT FROM 1026 AS WELL.

02:42PM 15 JUDGE WALKER NOTED THAT COPYRIGHT'S PURPOSE IS TO OVERCOME
02:42PM 16 THE FREERIDER'S PROBLEM, THE COPIER PROBLEM. SO OBVIOUSLY
02:42PM 17 THAT'S SOMEONE ELSE'S STORY. BUT HE ALSO NOTED THAT OVERLY
02:42PM 18 INCLUSIVE COPYRIGHT PROTECTION CAN PRODUCE ITS OWN NEGATIVE
02:43PM 19 AFFECTS BY INHIBITING THE ADOPTION OF COMPATIBLE STANDARDS AND
02:43PM 20 REDUCING SO CALLED NETWORK EXTERNALITIES. SUCH STANDARDS IN A
02:43PM 21 GRAPHIC USER INTERFACE WOULD ENLARGE THE MARKET FOR COMPUTERS
02:43PM 22 BY MAKING THEM EASIER TO LEARN HOW TO USE THEM.

02:43PM 23 SO WHAT HE'S TALKING ABOUT THERE IS WE GO FROM ONE COMPUTER
02:43PM 24 TO ANOTHER AND WE GO TO FILE AND WE CHOOSE PRINT, HAVING TO
02:43PM 25 SWITCH THAT WHEN YOU GO TO ANOTHER COMPUTER, THAT'S NO GOOD FOR

02:43PM 1 ANYONE.

02:43PM 2 AND ALL THE COMPUTERS ARE EASIER TO USE IF WE ALL AGREE,
02:43PM 3 JUST LIKE IF WE ALL AGREE WHERE THE STEERING WHEEL IS GOING TO
02:43PM 4 BE ON THE CAR, THE FACT THAT THERE'S GOING TO BE A STEERING
02:43PM 5 WHEEL, THAT THE BRAKE IS GOING TO BE ON THE LEFT, THOSE ARE ALL
02:43PM 6 GOOD THINGS FOR EVERYONE INVOLVED.

02:43PM 7 AND HE SAID, JUDGE WALKER SAID, WHILE THE MACINTOSH
02:43PM 8 INTERFACE, WHICH WAS THE COPYRIGHTED, THE KEY COPYRIGHTED ISSUE
02:43PM 9 THERE, MAY BE THE FRUIT OF CONSIDERABLE EFFORT BY ITS
02:43PM 10 DESIGNERS, IT SUCCESES THE RESULT OF A HOST OF FACTORS,
02:43PM 11 INCLUDING VARIOUS HARBOR DECISIONS AND THE LIKE.

02:43PM 12 AND I THINK THAT'S CLEARLY TRUE HERE AS WELL, THAT WHILE WE
02:43PM 13 HAVE AN INTERFACE, WE HAVE A LOT OF OTHER SOFTWARE BEHIND THAT,
02:44PM 14 AND MORE IMPORTANTLY, WE HAVE A LOT OF HARDWARE BEHIND THAT.

02:44PM 15 THERE'S NO PURPOSE IN HAVING AN INTERFACE FOR A NETWORK
02:44PM 16 SWITCH IF YOU DON'T ACTUALLY HAVE A NETWORK SWITCH. SO YOU
02:44PM 17 HAVE TO HAVE THE HARDWARE.

02:44PM 18 AND HE SAID, EVEN WERE APPLE ABLE TO ISOLATE THAT PART OF
02:44PM 19 ITS INTERFACES' SUCCESS GOING TO ITS DESIGN EFFORTS, LENGTHY
02:44PM 20 AND CONSERVATIVE EFFORT ALONE DOES NOT ALWAYS RESULT IN
02:44PM 21 INHERENTLY PROTECTABLE EXPRESSION.

02:44PM 22 AND THEN ON PAGE 1026, HE SAID, AFTER A DISCUSSION OF THE
02:44PM 23 COMPETITION THAT THIS ALLOWS, THE GOOD COMPETITION THIS ALLOWS,
02:44PM 24 HE SAID THE IMPORTANCE OF SUCH COMPETITION AND THUS
02:44PM 25 IMPROVEMENTS OR EXTENSIONS OF PAST EXPRESSIONS, SHOULD NOT BE

02:44PM 1 MINIMIZED.

02:44PM 2 SO AS HE WAS CONSIDERING THE ENTIRE PROCESS OF ANALYTIC
02:44PM 3 DISSECTION, HE OF COURSE WANTED TO PROTECT THE RIGHTFUL RIGHTS
02:44PM 4 THAT BELONGED TO THE COPYRIGHT OWNER. BUT HE ALSO WANTED TO
02:45PM 5 MAKE SURE THAT HE DIDN'T CREATE A STRANGELY VULCANIZED SYSTEM
02:45PM 6 WHERE NO ONE WAS ABLE TO USE A TRASH SYMBOL OR A FOLDER ICON,
02:45PM 7 THINGS LIKE THAT.

02:45PM 8 BUT TURNING TO THE NOTION OF HIERARCHY --

02:45PM 9 THE COURT: AND WAS THAT BECAUSE IT WAS TOO RELATED
02:45PM 10 TO THE FUNCTIONALITY? HOW IS HE -- WHAT WAS HIS HOOK ON THAT
02:45PM 11 AS TO WHY IT WOULDN'T BE PROTECTED?

02:45PM 12 MR. KWUN: SO HIS HOOK ON THAT, A LOT OF IT DID HAVE
02:45PM 13 TO DO WITH WHERE THESE THINGS CAME FROM, THE METAPHORS AND
02:45PM 14 IDEA.

02:45PM 15 BUT IF YOU LOOK AT THE CASE LAW, WE ALSO HAVE THE SEGA CASE
02:45PM 16 AND THE SONY CASE WHERE THE NINTH CIRCUIT TALKS DIRECTLY ABOUT
02:45PM 17 THE NEED FOR ALLOWING COMPETITION, AND THAT THERE'S PROPER
02:45PM 18 COMPETITION, THAT THERE IS SUCH A THING AS COMPETITION THAT THE
02:45PM 19 COPYRIGHT ACT AND COPYRIGHT LAWS ARE SUPPOSED TO FOSTER RATHER
02:45PM 20 THAN HINDER.

02:45PM 21 THE COURT: OKAY.

02:45PM 22 MR. KWUN: IF I COULD HAVE SLIDE 37 UP.

02:46PM 23 THIS IS FROM CISCO'S -- ONE OF CISCO'S INTERROGATORY
02:46PM 24 RESPONSES. AND I THINK THAT REALLY GETS AT A POINT, THAT AT
02:46PM 25 LEAST I THOUGHT YOU WERE TRYING TO RAISE YOURSELF, WHICH IS

02:46PM 1 THAT THE HIERARCHY, THEY SAY THE COPYING OF THE HIERARCHY
02:46PM 2 EXISTS BECAUSE OF THE COPYING OF THE COMMAND EXPRESSIONS. AND
02:46PM 3 I THINK THEY ARE REALLY ONE AND THE SAME.

02:46PM 4 AND I THINK THAT IF YOU LOOK AT, DURING THEIR PRESENTATION
02:46PM 5 WE SAW A SLIDE, SLIDE 19, THIS WAS BEFORE WE GOT TO
02:46PM 6 HIERARCHIES, SLIDE 19 IN CISCO'S PRESENTATION TODAY, TALKED
02:46PM 7 ABOUT WHY THE INDIVIDUAL COMMAND PHRASES WERE COPYRIGHTABLE.

02:46PM 8 AND WHAT YOU HEARD IS THAT THERE WAS CREATIVITY IN THE
02:46PM 9 ORDER. BUT THE THING IS, IF YOU SAY THERE'S CREATIVITY IN THE
02:46PM 10 ORDERING, YOU CAN'T CLAIM A HIERARCHY ANYMORE. BECAUSE THE
02:46PM 11 HIERARCHY REQUIRES THAT IF YOU HAVE -- IF YOU ORDER THINGS BY
02:46PM 12 SHOW, THAT THEY ALL START WITH THE WORD SHOW. YOU NO LONGER
02:47PM 13 CAN PUT THE WORD SHOW AT THE END OF YOUR COMMAND, BECAUSE NOW
02:47PM 14 YOU ARE IN A DIFFERENT HIERARCHY.

02:47PM 15 AND REALLY, ALL YOU HAVE HEARD ABOUT THE HIERARCHY, IS THE
02:47PM 16 HIERARCHY IS A LIST OF, WHEN I TYPE IN ONE WORD, HOW MANY
02:47PM 17 COMMANDS BEGIN WITH THAT WORD.

02:47PM 18 AND YOU HEARD THAT THERE ARE SOME COMMANDS THAT DON'T
02:47PM 19 ACTUALLY EXIST IN A HIERARCHY. BUT YOU ALSO HEARD THAT THE WAY
02:47PM 20 YOU CAN FIND THESE HIERARCHIES IS YOU TYPE IN THE FIRST WORD
02:47PM 21 AND A QUESTION MARK.

02:47PM 22 AND I LIKE THE QUESTION I HEARD WHICH IS, WELL WHAT IF
02:47PM 23 THERE IS A COMMAND, A SEVERAL-WORD COMMAND, THAT IS ACCORDING
02:47PM 24 TO CISCO, NOT IN THE HIERARCHY. AND YOU TYPE IN THE FIRST WORD
02:47PM 25 AND YOU TYPE QUESTION MARK, WHAT DO YOU GET? YOU GET A LISTING

02:47PM 1 OF WHAT MR. PAK THEN CONCEDED MIGHT BE TERMED A HIERARCHY OF
02:47PM 2 ONE.

02:47PM 3 THE COURT: RIGHT.

02:47PM 4 MR. KWUN: SO THERE'S REALLY NO DIFFERENCE BETWEEN
02:47PM 5 THIS.

02:47PM 6 AND SO THEN THE QUESTION IS, WHY DOES THIS MATTER? I MEAN,
02:47PM 7 CERTAINLY WE WOULD CONCEDE THAT EVERY COMMAND OUT THERE HAS A
02:47PM 8 FIRST WORD. SO WHY CAN'T THEY JUST CALL THAT A HIERARCHY?

02:47PM 9 AND THE REASON WHY IS BECAUSE WE HAVE A COPYRIGHT CASE HERE
02:48PM 10 THAT'S BASED NOT ON COPYING OF THE HARDWARE, NOT ON COPYING OF
02:48PM 11 THE SOURCE CODE, IT'S BASED ON THESE APPROXIMATELY 500
02:48PM 12 COMMANDS.

02:48PM 13 AND FRANKLY, WE WON'T AGREE ON THIS TODAY, BUT I THINK
02:48PM 14 THAT'S A PRETTY THIN CASE. AND CISCO WANTS TO BE ABLE TO SAY
02:48PM 15 OH, BUT THERE'S SO MUCH MORE THAT WAS COPIED.

02:48PM 16 AND SO THEY WANT TO BE ABLE TO SAY NOT ONLY DID THEY COPY
02:48PM 17 OUR COMMANDS, THEY ALSO COPIED OUR HIERARCHIES.

02:48PM 18 THE COURT: SO IT'S DOUBLE COUNTING IS WHAT YOU ARE
02:48PM 19 SAYING.

02:48PM 20 MR. KWUN: IT'S ABSOLUTELY DOUBLE COUNTING.

02:48PM 21 AND IT'S GOING TO BE HARD, THIS IS GOING TO BE A HARD CASE
02:48PM 22 FOR A LOT OF THE JURORS TO GET. THIS IS GOING TO BE TECHNOLOGY
02:48PM 23 THAT THEY ARE NOT FAMILIAR WITH, THERE ARE GOING TO BE WORDS,
02:48PM 24 PROTOCOLS THEY ARE NOT FAMILIAR WITH, ALL OF THIS IS GOING TO
02:48PM 25 BE A LITTLE STRANGE TO THEM. PROBABLY A LOT OF THEM HAVE NEVER

02:48PM 1 USED A COMMAND LINE.

02:48PM 2 THE COURT: RIGHT.

02:48PM 3 MR. KWUN: SO WHEN THEY HEAR THAT THERE ARE TWO
02:48PM 4 THINGS, IT'S NOT GOING TO BE IMMEDIATELY APPARENT TO THEM AND
02:48PM 5 IT'S UNFAIR FOR ARISTA TO HAVE TO BATTLE AGAINST THE SUGGESTION
02:49PM 6 THAT THERE ARE TWO THINGS BEING COPIED.

02:49PM 7 THE COURT: SO I'M MORE IN LINE WITH YOUR ARGUMENT
02:49PM 8 THAT IT IS THE HIERARCHY THAT IS WHERE THE CREATIVE PROCESS
02:49PM 9 OCCURRED AND THE COMMAND LINE IS SIMPLY THE OUTPUT OF THAT
02:49PM 10 CREATIVE PROCESS. NOTHING MORE COULD POSSIBLY HAVE GONE INTO
02:49PM 11 THE COMMAND LINE THAT WASN'T DETERMINED IN THE CREATION OF THE
02:49PM 12 HIERARCHY. THAT WOULD INCLUDE THE COMMAND LINES THAT ARE AT
02:49PM 13 HIERARCHY OF ONE.

02:49PM 14 AND I THINK CONCEPTUALLY, THAT WORKS. AND I SUPPOSE WE
02:49PM 15 WOULD HAVE TO LET -- CISCO ALLEGES A HIERARCHY, THOSE OF THE
02:49PM 16 508 THAT DON'T LIVE IN ONE OF THESE ASSERTED HIERARCHIES
02:49PM 17 BECAUSE I'M -- WE ARE KIND OF -- I'M AGREEING WITH YOU THAT
02:49PM 18 IT'S THE HIERARCHY, BECAUSE YOU ARE RIGHT, ONCE THEY PICK SHOW
02:49PM 19 AS THE FIRST WORD, MR. NELSON'S PROCESS OF ONE LINE OF DECIDING
02:49PM 20 WHERE THE WORDS GO, ACTUALLY IS NOT WHAT THEY DID.

02:50PM 21 THAT'S NOT WHAT WAS DONE. IT WAS DONE AT THE HIERARCHY
02:50PM 22 STAGE OF WHAT ARE WE GOING TO ACCUMULATE UNDER SHOW, WHAT ARE
02:50PM 23 WE GOING TO ACCUMULATE UNDER BANNER OR IP OR, THERE ARE DOZENS
02:50PM 24 OF THEM, BUT IT WAS A STEP-BY-STEP DETERMINATION, ONCE YOU PICK
02:50PM 25 THE FIRST STEP, THEN THE COMMAND LINE THAT'S SPIT OUT IS JUST

02:50PM 1 THE RESULT OF IT, OF THE HIERARCHY.

02:50PM 2 IS THAT WHAT YOU ARE SAYING?

02:50PM 3 MR. KWUN: WELL, THAT'S CERTAINLY ONE WAY OF VIEWING
02:50PM 4 IT. AND I WANT TO TAKE THAT TO ITS END CONCLUSION, WHICH IS IT
02:50PM 5 ACTUALLY TAKES OUT THE ALLEGATION AS TO THE 500 COMMANDS.

02:50PM 6 THE COURT: THAT'S WHAT I'M SAYING. BUT ALL OF THEM
02:50PM 7 LIVE IN A HIERARCHY.

02:50PM 8 MR. KWUN: SO THE CHOICE TO THEN SAY THAT THOSE
02:50PM 9 INDIVIDUAL COMMANDS ARE INDIVIDUALLY PROTECTABLE GOES OUT THE
02:50PM 10 WINDOW BECAUSE THEY ARE NOT CLAIMING PROTECTION OVER INDIVIDUAL
02:50PM 11 WORDS, THEY ARE NOT CLAIMING PROTECTION OVER THE IDEA OF A
02:50PM 12 HIERARCHY BECAUSE WE ALL KNOW THAT WOULD BE NOT PROTECTABLE.

02:50PM 13 AND IF THE -- IF THEY WANT TO HOLD ON TO HIERARCHY, THEN
02:50PM 14 THERE IS NO LONGER A CLAIM ABOUT 500 INDIVIDUAL COMMANDS.

02:51PM 15 SO THAT IS ONE POTENTIAL WAY OF VIEWING IT, I SUPPOSE.
02:51PM 16 HIERARCHY AT THAT POINT, IT BECOMES SOMEWHAT -- IT DOES SEEM
02:51PM 17 STILL TO BE A RATHER FANCY WAY OF SAYING WE HAD SOME WORDS THAT
02:51PM 18 WE PUT TOGETHER.

02:51PM 19 THE COURT: AND THAT'S OKAY. BUT THAT CAN BE
02:51PM 20 PROTECTABLE.

02:51PM 21 MR. KWUN: IT COULD THEORETICALLY BE PROTECTABLE,
02:51PM 22 THAT'S TRUE.

02:51PM 23 THE COURT: AND THEN THE TWO-WORD PHRASES HAVE MORE
02:51PM 24 MEANING IF THEY ARE DEVELOPED UNDER THE CONSTRUCT OF A
02:51PM 25 HIERARCHY, BECAUSE THEN IT IS PART OF A MUCH BIGGER CREATIVE

02:51PM 1 PROCESS AS OPPOSED TO FOCUSING ON THE ONE LINE.

02:51PM 2 AND SO THEN I WOULDN'T FILTER OUT ANY OF THEM, I WOULD JUST
02:51PM 3 ADOPT OR INSTRUCT THE JURY THAT THE HIERARCHIES, AS YOU SEE
02:51PM 4 THEM, NOT THE IDEA OF A HIERARCHY, BUT THESE HIERARCHIES, ARE
02:51PM 5 PROTECTABLE.

02:51PM 6 MR. KWUN: SO I THINK THAT'S A DANGEROUS ROUTE TO GO
02:52PM 7 BECAUSE THAT BASICALLY WIPES OUT THE WORDS AND SHORT PHRASES
02:52PM 8 DOCTRINE.

02:52PM 9 IF THEY SWITCH TACTICS AND TRY TO SAY, WELL, IT HAS TO DO
02:52PM 10 WITH THE HIERARCHICAL STRUCTURE OF WHAT WORD GOES FIRST AND
02:52PM 11 WHAT WORD GOES SECOND, THEN I DON'T NEED TO DEAL WITH THIS LONG
02:52PM 12 STANDING DOCTRINE.

02:52PM 13 THAT WOULD BE LIKE SAYING WELL, IN MY BOOK, I HAVE A LOT OF
02:52PM 14 SENTENCES THAT START WITH THE WORD I, AND I'M GOING TO CALL
02:52PM 15 THAT A HIERARCHY, AND THEREFORE YOUR ARGUMENT THAT I RUN, I
02:52PM 16 WALK, THAT THOSE ARE ALL SHORT PHRASES IS NO LONGER ANY GOOD.

02:52PM 17 THE COURT: WELL, WHAT MR. NELSON TOLD ME WAS THEY
02:52PM 18 ARE NOT ASSERTING THE, EACH INDIVIDUAL HIERARCHY OF A PHRASE.
02:52PM 19 THEY ARE ASSERTING THE ENTIRE SHOW HIERARCHY IN IOS AS AN
02:52PM 20 ENTIRETY AS OPPOSED TO EACH LINE OF IT. AND THAT'S DIFFERENT
02:52PM 21 TO ME.

02:52PM 22 MR. KWUN: SO WHAT YOU HAVE SEEN IN THE BRIEFING THAT
02:52PM 23 HAS BEEN SUBMITTED SO FAR ON THESE HIERARCHIES, I JUST WANT TO
02:53PM 24 MAKE CLEAR THAT THEY HAVE TAKEN A HIERARCHY FOR CISCO AND A
02:53PM 25 HIERARCHY FOR ARISTA, NEITHER OF WHICH EXISTS IN THE ACTUAL

02:53PM 1 WORLD.

02:53PM 2 THE COURT: OKAY. SO I KNOW THAT'S BEEN SAID BEFORE
02:53PM 3 AND I JUST READ IT AND I'M ENTIRELY LOST. YOU HAVE TO EXPLAIN
02:53PM 4 THAT TO ME. BECAUSE I MEAN, I UNDERSTAND WHAT THAT MEANS, BUT
02:53PM 5 I'M LOOKING AT THEIR -- THE HIERARCHIES THAT THEY DISCLOSED AS
02:53PM 6 BEING COPIED. AND YOU ARE TELLING ME THEY DON'T EVEN EXIST?

02:53PM 7 MR. KWUN: THEY EXIST AS SUBSETS OF AN ACTUAL
02:53PM 8 HIERARCHY. AND WHAT I MEAN BY THAT IS THERE ARE A LOT OF
02:53PM 9 COMMANDS THAT A CISCO SWITCH CAN UNDERSTAND THAT START WITH THE
02:53PM 10 WORD SHOW.

02:53PM 11 THE COURT: OKAY.

02:53PM 12 MR. KWUN: AND THERE ARE A LOT OF COMMANDS THAT AN
02:53PM 13 ARISTA SWITCH CAN UNDERSTAND THAT START WITH THE WORD SHOW.
02:53PM 14 AND THERE IS SOME OVERLAP BETWEEN THOSE. BUT THE HIERARCHIES
02:53PM 15 THEY SHOW YOU ARE THE OVERLAP. THEY DON'T SHOW ALL OF THE
02:54PM 16 POSSIBLE SHOW COMMANDS.

02:54PM 17 AND IF THEY ARE CLAIMING THAT THEIR CREATIVITY WAS IN THEIR
02:54PM 18 HIERARCHY, THE SELECTION OF THE, LET'S SAY 150 ITEMS IN A
02:54PM 19 HIERARCHY, AND THEN WE HAD 130, AND THEY WEREN'T EVEN THE
02:54PM 20 SAME -- THEY WEREN'T EVEN A SUBSET OF THAT, THEY OVERLAP
02:54PM 21 SOMEWHAT, THAT'S REALLY IMPORTANT.

02:54PM 22 IF INDEED THE CLAIM IS OVER THE HIERARCHY, THE FACT THAT WE
02:54PM 23 ARE NOT THE SAME, PARTICULARLY UNDER A VIRTUAL IDENTICAL
02:54PM 24 STANDARD, THAT'S GOING TO BE VERY IMPORTANT FOR THE JURY.

02:54PM 25 THE COURT: IT'S A LITTLE BIT LIKE A VIN DIAGRAM YOU

02:54PM 1 ARE SHOWING ME. IS THAT WHAT IT IS?

02:54PM 2 MR. KWUN: IT IS A VIN DIAGRAM. SO IF YOU HAVE THE
02:54PM 3 TWO CIRCLES AND YOU HAVE THE OVERLAP AREA, ALL YOU HAVE BEEN
02:54PM 4 SHOWN SO FAR IS THE OVERLAP WITHOUT ANY INDICATION THAT THERE'S
02:54PM 5 TWO LARGER CIRCLES.

02:54PM 6 THE COURT: SO IT GETS A LITTLE PERPLEXING TO ME,
02:54PM 7 BECAUSE OF COURSE CISCO'S OBLIGATION IS TO SHOW ME THE ELEMENTS
02:54PM 8 THAT THEY ALLEGE HAVE BEEN COPIED AND NOT TO SHOW ME AND BOTHER
02:55PM 9 ME WITH THINGS THAT HAVEN'T BEEN COPIED.

02:55PM 10 MR. KWUN: SURE.

02:55PM 11 THE COURT: SO THIS WAS THEIR JOB. AND IT IS
02:55PM 12 IMPORTANT TO UNDERSTAND THAT ALL -- AND YOU KNOW, I'M JUST
02:55PM 13 LOOKING AT A PAGE, I HAPPEN TO BE OPEN TO PAGE 60, THAT IS
02:55PM 14 NEIGHBOR.

02:55PM 15 AND NX-OS, WHAT YOU ARE SAYING IS THAT CISCO HAS A
02:55PM 16 HIERARCHY THAT BEGINS WITH NEIGHBOR. AND IT WOULD PROBABLY
02:55PM 17 HAVE MORE THAN THE 10 OR 8 LISTED SECOND PHRASES, SECOND WORDS.

02:55PM 18 MR. KWUN: QUITE POSSIBLY. AS TO ANY PARTICULAR
02:55PM 19 HIERARCHY, I'M NOT GOING TO BE ABLE TO TELL YOU.

02:55PM 20 THE COURT: JUST AS AN EXAMPLE.

02:55PM 21 MR. KWUN: YES. I CAN GIVE YOU ONE EXAMPLE. IF WE
02:55PM 22 CAN SEE SLIDE 38, IT'S ONLY GOING TO ONE DIRECTION.

02:55PM 23 THE COURT: OKAY. ALL RIGHT.

02:55PM 24 MR. KWUN: THIS IS ONE OF THE HIERARCHIES THAT THEY
02:55PM 25 HAVE COMPARED.

02:55PM 1 AND SO FIRST OF ALL YOU WILL SEE AT THE TOP, THAT IS THE
02:55PM 2 BGP HIERARCHY FOR IOS, ACCORDING TO CISCO. BUT I WANT TO POINT
02:56PM 3 OUT THAT THAT ENTIRE DIAGRAM IS LAWYER-CREATED, THAT IS NOT OUT
02:56PM 4 OF A MANUAL OR ANYTHING ELSE, THAT IS A DEMONSTRATIVE CREATED
02:56PM 5 BY CISCO'S ATTORNEYS.

02:56PM 6 AND THEN DOWN AT THE BOTTOM, YOU HAVE THE CORRESPONDING
02:56PM 7 BORDER GATEWAY PROTOCOL HIERARCHY FOR AN ARISTA SWITCH. AND
02:56PM 8 YOU WILL SEE THAT THEY HAVE BLACKED OUT 1, 2, 3, 4 ITEMS IN
02:56PM 9 THERE. AND THE REASON THEY BLACKED THOSE OUT IS BECAUSE THOSE
02:56PM 10 DO NOT EXIST IN THE CISCO HIERARCHY.

02:56PM 11 SO THAT BLACKED OUT PORTION THERE IS THE MISSING CIRCLE ON
02:56PM 12 THE ARISTA CIRCLE, THE NON-OVERLAPPING PORTION.

02:56PM 13 AND THE BGP HIERARCHY AS SHOWN AT THE TOP OF THIS, IS
02:56PM 14 AGAIN, THAT AGAIN OMITTS ANYTHING THAT WE DID NOT COPY.

02:56PM 15 THE COURT: BUT THIS IS MORE A MATTER OF AN
02:56PM 16 EVIDENTIARY RULING THAT CISCO CANNOT INTRODUCE AS AN EXHIBIT, A
02:56PM 17 DOCUMENT THAT IS, THAT ONLY PURPORTS TO TAKE A PIECE OF THEIR
02:57PM 18 OWN HIERARCHY. THEY HAVE TO SHOW THEIR HIERARCHY AND SHOW YOUR
02:57PM 19 HIERARCHY AND THEN ARGUE THE COPYING AND SHOW THE OVERLAP TO
02:57PM 20 THE JURY AND ARGUE THE SUBSTANTIALITY OF THE COPYING. ISN'T
02:57PM 21 THAT AN EVIDENTIARY ISSUE?

02:57PM 22 MR. KWUN: I THINK IT'S CERTAINLY AN EVIDENTIARY
02:57PM 23 ISSUE. I THINK IT'S ALSO A JURY INSTRUCTION ISSUE.

02:57PM 24 AND ONE OF THE ITEMS THAT WAS ON THE LIST HERE WAS WHAT
02:57PM 25 SOMEWHAT STRANGELY PHRASED, AND IT WAS ITEM 4 THAT WE SKIPPED

02:57PM 1 OVER, THAT'S ACTUALLY WHAT WE ARE DISCUSSING NOW, THE ANY
02:57PM 2 PURPORTED SELECTION OR ARRANGEMENT OF COMMANDS THAT IS NOT
02:57PM 3 GROUNDED IN CISCO'S ACTUAL WORKS.

02:57PM 4 THE COURT: WHAT PAGE ARE YOU ON?

02:57PM 5 MR. KWUN: THIS IS ON PAGE 1 OF THE JOINT SUBMISSION
02:57PM 6 REGARDING ANALYTIC DISSECTION. THAT'S AT ABOUT LINE 18. I
02:57PM 7 THOUGHT THIS WAS WHAT YOU WERE JUST READING FROM --

02:57PM 8 THE COURT: WELL, I'VE GONE BACK INTO YOUR DOCUMENT
02:57PM 9 THAT EXPLAINS THEM.

02:57PM 10 MR. KWUN: I SEE.

02:57PM 11 THE COURT: THIS IS 3A-6.

02:58PM 12 MR. KWUN: 3A-6. YES. AND I BELIEVE, I'M JUST GOING
02:58PM 13 OFF THE SUMMARY DOCUMENT, BUT I BELIEVE THE INTENT --

02:58PM 14 THE COURT: OKAY. AND I DIDN'T UNDERSTAND THAT AT
02:58PM 15 ALL. SO THANK YOU. THAT'S REALLY HELPFUL.

02:58PM 16 MR. KWUN: BUT THE BASIC NOTION HERE IS THAT THE JURY
02:58PM 17 NEEDS TO UNDERSTAND THAT WHEN THEY ARE BEING ASKED TO EVALUATE
02:58PM 18 THE COPYING OF A SELECTION, THAT THEY NEED TO UNDERSTAND WHAT
02:58PM 19 THEY ARE COMPARING IS THE ENTIRE SELECTION ON ONE SIDE TO THE
02:58PM 20 ENTIRE SELECTION ON THE OTHER SIDE, NOT JUST THE COPIED PART
02:58PM 21 BECAUSE OF COURSE THAT WOULDN'T ANSWER THE QUESTION FOR THEM.

02:58PM 22 THE COURT: AND THAT'S HELPFUL, BECAUSE I ACTUALLY
02:58PM 23 DIDN'T UNDERSTAND THAT. I THOUGHT THESE HIERARCHIES WERE
02:58PM 24 CISCO'S HIERARCHIES, LOCK, STOP AND BARREL FOR SHOW OR FOR
02:58PM 25 SOMETHING ELSE AND IT'S NOT.

02:58PM 1 AND SO ACTUALLY, WHAT'S HERE IN THE -- IN CISCO'S
02:58PM 2 SUBMISSION, THESE WERE ONLY DEMONSTRATIVE. AND IT WOULD ONLY
02:58PM 3 COME IN AS A DEMONSTRATIVE AND COULDN'T BE ARGUED OTHERWISE.

02:58PM 4 AND SO THE EVIDENCE WOULD BE HERE'S CISCO'S HIERARCHY FOR
02:58PM 5 SHOW, AND HERE IS ARISTA'S HIERARCHY FOR SHOW, AND THEN HERE'S
02:59PM 6 THE DEMONSTRATIVE THAT SHOWS YOU HOW MUCH OF IT THEY TOOK FROM
02:59PM 7 OURS. IS THAT --

02:59PM 8 MR. KWUN: SURE, SURE. I DON'T NEED THEM TO DO THE
02:59PM 9 LAST PART BUT I SUPPOSE THEY WANT TO.

02:59PM 10 THE COURT: SO I'M ONLY DECIDING WHETHER HIERARCHIES
02:59PM 11 IN GENERAL, NOT IN HIERARCHY, IS PROTECTABLE. THAT'S NOT A
02:59PM 12 HARD DECISION FOR ME TO MAKE. I DON'T THINK IT IS. I MEAN,
02:59PM 13 THAT --

02:59PM 14 MR. KWUN: ALSO REMEMBER THERE'S TWO THINGS COMMANDS
02:59PM 15 AS WELL AS HIERARCHIES.

02:59PM 16 THE COURT: NOW WE ARE INTO WHETHER THEY ARE TWO
02:59PM 17 THINGS. LET'S JUST STICK WITH THE HIERARCHY FIRST.

02:59PM 18 SO IF I DECIDE THAT THE HIERARCHIES ARE PROTECTED BECAUSE I
02:59PM 19 HAVE REALLY UNDISPUTED EVIDENCE OF THIS PROCESS OF SELECTION
02:59PM 20 AND CONSIDERATION, AND IT'S THE ENTIRETY OF THE SHOW HIERARCHY,
02:59PM 21 I'M JUST USING THAT AS AN EXAMPLE, THERE ARE MANY OF THEM, THEN
02:59PM 22 THE ISSUE OF HOW MUCH OF IT WAS COPIED IS NOT MY CONCERN RIGHT
02:59PM 23 NOW. THAT'S NOT MY CONCERN ON ANALYTIC DISSECTION, CORRECT?

02:59PM 24 MR. KWUN: THAT IS NOT YOUR CONCERN.

03:00PM 25 WHAT WILL BE YOUR CONCERN, AT LEAST TOMORROW, IS HOW WE

03:00PM 1 PHRASE IT TO THE JURY SO THAT THEY CAN PROPERLY ENGAGE IN THAT
03:00PM 2 EXERCISE.

03:00PM 3 THE COURT: WELL, THAT HAS TO DO WITH YOUR DE MINIMUS
03:00PM 4 ISSUES AND YOUR FAIR USE ISSUES.

03:00PM 5 MR. KWUN: AND ALSO JUST GENERAL JURY INSTRUCTIONS TO
03:00PM 6 INFRINGEMENT. CERTAINLY, IT HAS TO DO WITH DE MINIMUS, BUT
03:00PM 7 IT'S GOING TO HAVE TO DO WITH THE VIRTUAL IDENTITY TEST AND
03:00PM 8 WHAT IT IS THEY ARE COMPARING WHEN THEY ARE DOING THIS.

03:00PM 9 THE COURT: IT CERTAINLY WILL.

03:00PM 10 MR. KWUN: BECAUSE OF THE THINGS THEY ARE GOING TO BE
03:00PM 11 HEARING ABOUT IS THAT THEY COPIED OUR HIERARCHY, AND THEY ARE
03:00PM 12 GOING TO NEED TO UNDERSTAND WHAT THAT MEANS.

03:00PM 13 THE COURT: OKAY.

03:00PM 14 WELL, MR. NELSON, IT SEEMS CLEAR TO ME THAT IF YOU WANT TO
03:00PM 15 SUGGEST TO THE JURY THAT YOUR HIERARCHY WAS COPYING, WE NEED TO
03:00PM 16 SEE YOUR HIERARCHY, NOT A PIECE OF YOUR HIERARCHY.

03:00PM 17 AND YOU CAN HIGHLIGHT AND PUT A RED BOX AROUND THE PORTION
03:00PM 18 OF IT THAT YOU ARE ALLEGING WAS COPIED, BUT YOU CAN'T
03:00PM 19 MISREPRESENT WHAT YOUR HIERARCHY IS.

03:00PM 20 MR. NELSON: OH, AGREED, YOUR HONOR. THAT'S WHY, AND
03:00PM 21 I APOLOGIZE IF I DIDN'T MAKE THAT CLEAR, BUT THAT'S WHY I TRIED
03:00PM 22 TO SAY --

03:00PM 23 THE COURT: I'M JUST COMING UP TO SPEED ON THIS.

03:00PM 24 MR. NELSON: THAT'S WHY I TRIED TO EMPHASIZE THAT
03:01PM 25 WHAT WE CHOSE TO DO IS ILLUSTRATE THEIR COPYING OF THAT WITH

03:01PM 1 THE ASSERTED COMMANDS.

03:01PM 2 THE COURT: OKAY.

03:01PM 3 MR. NELSON: WE COULD HAVE, YOU KNOW, GONE WELL
03:01PM 4 BEYOND THAT, BUT THEN WE START GETTING INTO A FIGHT LIKE WELL,
03:01PM 5 YOU DIDN'T COPY THESE COMMANDS AS OPPOSED TO THE HIERARCHY. SO
03:01PM 6 I AGREE WITH YOUR HONOR.

03:01PM 7 THE COURT: OKAY.

03:01PM 8 MR. NELSON: BUT I STILL JUST WANT TO MAKE CLEAR
03:01PM 9 THAT, YOU KNOW, THE COMMANDS THEMSELVES, THOSE ARE SEPARATE AND
03:01PM 10 APART FROM THE HIERARCHY, RIGHT.

03:01PM 11 THE COURT: I'M NOT SURE I'M GOING TO AGREE WITH YOU
03:01PM 12 ON IT BECAUSE I DON'T KNOW WHAT CREATIVE PROCESS BEYOND THE
03:01PM 13 HIERARCHY.

03:01PM 14 IT SEEMS LIKE ALL THE CREATIVITY WENT TO DEVELOPING THE
03:01PM 15 HIERARCHY AND THEN WHEN YOU GET TO THE COMMAND, IT IS JUST A
03:01PM 16 RESULT OF THE HIERARCHY.

03:01PM 17 MR. NELSON: NO, THAT'S NOT -- SO THE WORD CHOICES
03:01PM 18 THAT GO INTO THAT, THAT'S PART OF IT. WHAT WORDS YOU CHOOSE TO
03:01PM 19 PUT INTO THAT.

03:01PM 20 THE COURT: OKAY. BUT NOT THE ORDER OF THEM.

03:01PM 21 THE ORDER OF THEM IS DICTATED BY THE HIERARCHIES.

03:01PM 22 MR. NELSON: NOT ALWAYS, NOT ALWAYS.

03:01PM 23 AND LET ME SHOW YOU SLIDE 26 AGAIN JUST TO CLARIFY THIS
03:01PM 24 POINT WHILE WE ARE ON IT.

03:01PM 25 SO RECALL THESE ARE ACTUAL EXISTING HIERARCHIES THAT ARE IN

03:02PM 1 THERE, AND THERE'S TWO REASONS WHY THAT WON'T BE THE CASE.

03:02PM 2 SO WE HAVE ALL THE WAY TO THE LEFT OF THE SLIDE, AND SLIDE
03:02PM 3 26 IS SHOWING THE IP HIERARCHY. THERE'S OBVIOUSLY ADDITIONAL
03:02PM 4 CHILDREN THAT WE DIDN'T SHOW FOR PURPOSES OF THE SLIDE.

03:02PM 5 SO YOU HAVE A NUMBER OF THINGS, THIS WOULD BE ORGANIZED,
03:02PM 6 THIS COMMAND HIERARCHY, WHERE YOUR INITIAL PARENT, YOU KNOW, IS
03:02PM 7 THE IP. AND THEN YOU HAVE THE THINGS THAT YOU CAN DO TO IT
03:02PM 8 WHICH YOU WOULD CALL THE CHILDREN, RIGHT.

03:02PM 9 THE COURT: RIGHT.

03:02PM 10 MR. NELSON: BUT THEN YOU CAN SEE HERE IN THE "SHOW
03:02PM 11 HIERARCHY," IT ISN'T SET UP AND IT ISN'T DICTATED, BECAUSE
03:02PM 12 REMEMBER, THESE ARE GUIDELINES. THAT YOU NECESSARILY -- ANY
03:02PM 13 TIME YOU ARE DOING SOMETHING WITH THE IP PROTOCOL, YOU GOT TO
03:02PM 14 PUT IT IN THE IP HIERARCHY.

03:02PM 15 SO IF WE LOOK AT THIS SHOW, FOR EXAMPLE, YOU WILL SEE THAT
03:02PM 16 IP IS A CHILD IN THAT.

03:03PM 17 SO THAT WAS A CHOICE. IT COULD HAVE BEEN THAT THEY ADDED
03:03PM 18 SHOW TO IP, RIGHT. SO YOU ALWAYS HAVE THAT CREATIVE CHOICE OF
03:03PM 19 WHERE YOU DECIDE TO PUT THE INDIVIDUAL COMMAND WITHIN THE
03:03PM 20 HIERARCHY

03:03PM 21 THE COURT: IT'S SORT OF A CHICKEN AND EGG ISSUE
03:03PM 22 HERE. IT SEEMS TO ME THESE DECISIONS ARE MADE IN THE CONTEXT
03:03PM 23 OF CREATING THE HIERARCHIES.

03:03PM 24 MR. NELSON: WELL, NO, BECAUSE OFTEN TIMES WHAT WILL
03:03PM 25 HAPPEN IS THE HIERARCHY THEN WILL -- YOU WILL CONTINUE TO ADD

03:03PM 1 TO THAT AS A HIERARCHY, ONCE YOU HAVE DEVELOPED THOSE COMMANDS.

03:03PM 2 SO YOU WILL HAVE SOMETHING THE VRRP COMMAND, MAYBE VRRP, IP
03:03PM 3 SECONDARY, AND THEN WHEN YOU DECIDE TO EXPAND THAT, YOU WILL
03:03PM 4 SAY, BEING00, I'M GOING TO CREATE A VRRP HIERARCHY, AND I'M
03:03PM 5 GOING TO PUT ADDITIONAL FUNCTIONALITY UNDER THAT.

03:03PM 6 SO IT ISN'T NECESSARILY THAT THEY RESULT THAT WAY, THE WORD
03:03PM 7 CHOICES AND THE ORDERING IN TERMS OF, AND THEN OF COURSE THESE
03:04PM 8 COMMANDS YOU CAN SEE IF I STICK WITH THE VRRP ONE, YOU KNOW YOU
03:04PM 9 WILL HAVE VRRP DELAY, RELOAD, RIGHT.

03:04PM 10 SO SETTING ASIDE THE WORD CHOICES THAT WENT IN THERE, AND I
03:04PM 11 GAVE YOU THE EXAMPLE OF HOW FOR EACH OF THOSE WORDS IN
03:04PM 12 DESCRIBING FUNCTIONALITY THERE ARE MANY CHOICES THAT COULD HAVE
03:04PM 13 GONE INTO IT. AND WE WENT THROUGH THE "SHOW INVENTORY"
03:04PM 14 TESTIMONY ON THAT AS WELL WHICH WOULD BE THE TESTIMONY, SO THE
03:04PM 15 WORD CHOICES THEMSELVES.

03:04PM 16 THE COURT: WORD CHOICE, OKAY.

03:04PM 17 MR. NELSON: RIGHT.

03:04PM 18 BUT IN HERE, IN TERMS OF DELAY AND RELOAD, THOSE -- THERE
03:04PM 19 IS NO HIERARCHY THERE, RIGHT. YOU COULD HAVE JUST FLIPPED
03:04PM 20 THOSE AROUND BECAUSE YOU DON'T HAVE A DELAY HIERARCHY, YOU
03:04PM 21 DON'T HAVE A RELOAD HIERARCHY, FROM WHAT YOUR HONOR IS SAYING.

03:04PM 22 SO THERE ISN'T -- EVEN ONCE I CHOOSE TO SAY I'M GOING TO
03:04PM 23 PUT IT IN VRRP, WHATEVER THIS COMMAND IS, I'M GOING TO EXTEND,
03:04PM 24 FOR EXAMPLE VRRP LET'S JUST SAY I HAD IP SECONDARY, FIRST, NOW
03:04PM 25 I SAY OKAY, WELL I GOT TO DELAY THE RELOAD FUNCTIONALITY.

03:05PM 1 WELL, IT DOESN'T -- THAT DIDN'T DICTATE THE ORDERING OF
03:05PM 2 THAT. I COULD HAVE PUT, COULD HAVE CREATED A DELAY HIERARCHY.
03:05PM 3 I COULD HAVE SAID VRRP, EVEN IF I USED THE SAME WORD CHOICE
03:05PM 4 BECAUSE I DON'T WANT TO COMPLICATE THE ANALYSIS. I ALREADY
03:05PM 5 HAVE CHOSEN DELAY AND RELOAD FOR DESCRIBING THESE THINGS.

03:05PM 6 THE COURT: THAT'S ALL THE PROCESS OF THE CREATIVITY
03:05PM 7 IN THE HIERARCHY. BUT ONCE YOU HAVE A VRRP IP, THAT WILL
03:05PM 8 PRODUCE A COMMAND.

03:05PM 9 MR. NELSON: WELL, IN THIS PARTICULAR, THERE IS NO
03:05PM 10 VRRP IP COMMAND.

03:05PM 11 THE COURT: I SEE, THAT WAS A BAD CHOICE BECAUSE
03:05PM 12 THERE IS A SECONDARY. AND IT'S IP SECONDARY.

03:05PM 13 MR. NELSON: CORRECT.

03:05PM 14 THE COURT: AND -- BUT YOU HAVEN'T EXPLAINED TO ME
03:05PM 15 THAT THE AUTHORS OR ENGINEERS CREATED A COMMAND AND THEN PUT IT
03:05PM 16 INTO A HIERARCHY, YOU'VE DESCRIBED IT THE OTHER WAY AROUND.

03:05PM 17 MR. NELSON: WELL, WHAT I WAS TRYING TO DO IS TO SAY
03:05PM 18 THE ORDERING, THERE IS SOMETHING TO THE ORDERING AS WELL.

03:06PM 19 SO THERE WILL BE TESTIMONY THAT THAT IS THE CASE, RIGHT.

03:06PM 20 THE COURT: SO IT SEEMS TO ME MORE LIKELY THEN THAT
03:06PM 21 WHAT YOU ARE TALKING ABOUT IS THAT HIERARCHIES ARE CREATED AND
03:06PM 22 IT'S AN EVOLVING PROCESS, AND WHEN YOU GET TO THE SELECTION OF
03:06PM 23 SHOW IP, IT COULD BE IP SHOW. YOU COULD HAVE DONE IT EITHER
03:06PM 24 WAY.

03:06PM 25 AND IN FACT, YOU COULD STILL DO IT BOTH WAYS, NOTHING WOULD

03:06PM 1 PREVENT DOING IT BOTH WAYS AND CREATING, YOU HAVE SHOW IP AND
03:06PM 2 THEN SOMETHING ELSE HERE IN THE SHOW HIERARCHY, BUT NOTHING
03:06PM 3 TELLS ME THAT WHEN THE ENGINEERS WERE CREATING THE IP HIERARCHY
03:06PM 4 THEY COULDN'T HAVE PUT SHOW AS THE SECONDARY WORD.

03:06PM 5 MR. NELSON: WELL, NO, THEY COULD HAVE, BUT THAT'S
03:06PM 6 PART OF THE POINT, RIGHT.

03:06PM 7 SO YOU HAVE SEVERAL CHOICES WITH RESPECT TO THAT. LET'S
03:06PM 8 SET ASIDE THE WORD CHOICE CREATIVITY FOR A MOMENT BECAUSE THERE
03:06PM 9 ARE CREATIVITY AND THAT WILL BE THE TESTIMONY THERE IS
03:07PM 10 CREATIVITY WITH RESPECT TO EACH OF THESE INDIVIDUAL WORD
03:07PM 11 CHOICES, RIGHT, IN TERMS OF WHAT COMBINATION I PICK.

03:07PM 12 BUT EVEN ONCE YOU'RE GIVEN THAT, SO IT MAY BE THAT THE
03:07PM 13 DESIGNERS AND THE STATE OF THE UI AT THAT POINT, THERE IS A
03:07PM 14 SHOW HIERARCHY, RIGHT. AT SOME POINT IN TIME.

03:07PM 15 AND YOU MAY SAY I WANT TO ADD TO THE SHOW HIERARCHY. SO
03:07PM 16 I'M GOING TO PUT SHOW AS THE FIRST WORD IN THIS COMMAND, RIGHT.
03:07PM 17 THAT MAY BE THE CASE.

03:07PM 18 ALSO, AS YOU SEE HERE, YOU MAY BE, BECAUSE I'M WORKING ON
03:07PM 19 THE IP PROTOCOL AND THERE EITHER EXISTS AN IP PROTOCOL OR LET'S
03:07PM 20 SAY THERE'S A POINT IN TIME WHERE THERE WAS NO IP HIERARCHY,
03:07PM 21 YOU COULD DECIDE I WANT TO PUT IP AS THE FIRST COMMAND, EITHER
03:07PM 22 BECAUSE I WANT TO CREATE A NEW IP HIERARCHY OR I WANT TO GO
03:07PM 23 TOTALLY OUTSIDE THE EXISTING HIERARCHIES.

03:07PM 24 SAME WITH THE VRRP THAT YOU CAN SEE HERE. SO THERE IS A
03:07PM 25 CHOICE. AND YOU CAN, YOU CAN HAVE THESE THINGS OUTSIDE, LET'S

03:07PM 1 SAY I DECIDED, YOU KNOW WHAT, RELOAD IS REALLY THE IMPORTANT
03:08PM 2 THING HERE, I COULD GO RELOAD, DELAY VRRP, RIGHT. I COULD DO
03:08PM 3 THAT. AND I UNDERSTAND --

03:08PM 4 THE COURT: BUT I UNDERSTAND ALL OF THAT. AND I'M
03:08PM 5 WITH YOU ON THE CREATIVE PROCESS THAT GOES INTO THESE
03:08PM 6 HIERARCHIES, I'M NOT REALLY STRUGGLING WITH THAT.

03:08PM 7 THE QUESTION IS ARE YOU DOUBLE COUNTING? AND THE JURY
03:08PM 8 HEARING THAT THE HIERARCHY IS CREATIVE AND THEN HEARING FROM
03:08PM 9 YOU SEPARATELY, AND EACH OF THESE COMMAND LINES IS CREATIVE,
03:08PM 10 AND WHEN YOU ADD IT ALL TOGETHER, NOW WE ARE REALLY TALKING
03:08PM 11 COPYING. WHEN IN FACT, WE REALLY SHOULD LOOK AT IT AS THE
03:08PM 12 CREATIVE EFFORT THAT WENT INTO THE HIERARCHIES THEMSELVES, AND
03:08PM 13 SOME HIERARCHIES HAVE ONLY ONE COMMAND LINE THAT IS PRODUCED BY
03:08PM 14 THEM, AND IT CAN CHANGE OVER TIME, BUT WE ARE LOOKING BACKWARDS
03:08PM 15 HERE.

03:08PM 16 MR. NELSON: SO WITH THAT, AND I UNDERSTAND WHAT
03:08PM 17 YOUR HONOR IS SAYING, AND THAT'S WHY -- THAT'S WHY WE TRY TO
03:08PM 18 USE THE EXAMPLES OF HOW THE HIERARCHIES EXIST INDEPENDENTLY,
03:09PM 19 WHICH IS WHAT WE WOULD TALKING ABOUT, NOT A RECOUNTING OF THE
03:09PM 20 COMMANDS, THAT COULD BE CLEAR THAT'S NOT WHAT WE ARE TALKING
03:09PM 21 ABOUT.

03:09PM 22 WE ARE TALKING ABOUT THE ORGANIZATIONAL STRUCTURE SUCH THAT
03:09PM 23 WE KNOW WHEN YOU GO IN YOU TYPE SHOW QUESTION MARK AND YOU GET
03:09PM 24 BECAUSE THAT IS A HIERARCHICAL STRUCTURE WITHIN THERE, YOU GET
03:09PM 25 ALL THE THINGS YOU CAN DO UNDER THAT.

03:09PM 1 THE COURT: BUT TO ME, YOU ARE GETTING INTO THE IDEA
03:09PM 2 OF HELP DESCRIPTIONS AS TO IF YOU PUT SHOW AND QUESTION MARK IT
03:09PM 3 TELLS YOU WHAT YOUR OPTIONS ARE. AND I'M A LITTLE BIT -- I
03:09PM 4 THINK THAT TAKES YOU A STEP BACKWARDS.

03:09PM 5 MR. NELSON: I UNDERSTAND WHAT YOU ARE SAYING BUT
03:09PM 6 THAT'S WHY, IT'S NOT THE IDEA OF THAT, THAT IS AN
03:09PM 7 IMPLEMENTATION OF THE SHOW HIERARCHY WHICH THEY DID IN THE SAME
03:09PM 8 WAY.

03:09PM 9 THE COURT: SO SHOW QUESTION MARK PRODUCES THIS
03:09PM 10 HIERARCHY THAT IS LONGER THAN WHAT I'VE SEEN HERE BUT IT
03:09PM 11 PRODUCES THE WHOLE LENGTHY --

03:09PM 12 MR. NELSON: THAT'S EXACTLY RIGHT. THAT'S WHAT WE
03:09PM 13 WOULD BE SAYING.

03:09PM 14 SO THE COMMANDS, WE ARE NOT TALKING ABOUT TRYING TO DOUBLE
03:09PM 15 COUNT AND SAY OH, LOOK, WE HAVE 506 COMMANDS AND THESE
03:10PM 16 HIERARCHIES ARE ANOTHER, YOU KNOW, LOOK AT ALL THESE COMMANDS.
03:10PM 17 IT'S THE HIERARCHICAL STRUCTURE. WE HAVE TO FIGURE OUT EXACTLY
03:10PM 18 HOW TO LIMIT THAT, BECAUSE I UNDERSTAND WHAT YOUR HONOR IS
03:10PM 19 SAYING.

03:10PM 20 THE COURT: I'M NOT SURE IT'S DIFFERENT IN THE
03:10PM 21 PROCESS OF CREATING THE HIERARCHICAL STRUCTURE AS CREATING THE
03:10PM 22 COMMAND LINE.

03:10PM 23 MR. PAK: SO YOUR HONOR, IF I MAY.

03:10PM 24 MR. NELSON SHOWED THE SHOW INVENTORY EXAMPLE, THAT IS ONE
03:10PM 25 IS WE PICKED TOGETHER SPECIFICALLY TO ILLUSTRATE TWO THINGS.

03:10PM 1 ONE IS THERE WAS A HIERARCHICAL CHOICE AS TO WHETHER WHEN
03:10PM 2 YOU ARE DISPLAYING THIS INFORMATION ABOUT THE PART NUMBERS AND
03:10PM 3 THE SERIAL NUMBERS AND THE SWITCHES, SWITCH EQUIPMENT THAT YOU
03:10PM 4 ARE USING, DO YOU USE THE SHOW HIERARCHY, DO YOU CREATE
03:10PM 5 SOMETHING CALLED MODULE AT THE VERY BEGINNING, BECAUSE NOW YOU
03:10PM 6 WANT TO HAVE HIERARCHY, THOSE ARE HIERARCHICAL CHOICES.

03:10PM 7 BUT THE REASON WHY WE PICKED THAT EXAMPLE IS EVEN AFTER YOU
03:10PM 8 MADE THE HIERARCHICAL DECISION TO GO WITH THE SHOW HIERARCHY
03:10PM 9 AND OTHER TYPES OF CREATIONS OF NEW HIERARCHIES, HE STILL HAD
03:10PM 10 IMPORTANT DECISIONS TO MAKE ABOUT THE WORD CHOICE SPECIFICALLY.

03:11PM 11 THE COURT: THE WORD CHOICE IS, I THINK, PERSUASIVE.

03:11PM 12 MR. PAK: AND SO IF YOU THINK ABOUT THAT, IT'S NOT
03:11PM 13 JUST THE CREATIVE SPARK IN DECIDING DO I USE AN EXISTING
03:11PM 14 HIERARCHY, IF SO, WHICH ONE, AND ALSO POSSIBLY CREATE A NEW
03:11PM 15 HIERARCHY, THAT'S THE HIERARCHICAL SPARK. THERE'S ALSO THE
03:11PM 16 CREATIVE SPARK, IN MANY INSTANCES, OF WHAT ARE THE WORDS THEY
03:11PM 17 USE.

03:11PM 18 AND WHAT WAS REALLY INTERESTING ABOUT MR. REMAKER'S
03:11PM 19 TESTIMONY IS HE ACTUALLY TALKS ABOUT POTENTIAL CONFLICTS WITH
03:11PM 20 THE EXISTING HIERARCHIES THAT IF YOU USE THE CERTAIN WORD LIKE
03:11PM 21 IDENTITY, BECAUSE THERE WERE OTHER TYPES OF SECURITY FEATURES
03:11PM 22 IN THE SYSTEM. HE SAID IF I USE SHOW IDENTITY, ALL OF THE
03:11PM 23 INDUSTRY STANDARD DOCUMENTS TALK ABOUT IDENTITY AS THE TERM FOR
03:11PM 24 THAT TYPE OF STRUCTURE. THAT MIGHT START TO CREATE CONFUSION
03:11PM 25 WITH THE EXISTING TERMINOLOGY.

03:11PM 1 THE COURT: SO I GUESS ONE OF MY PROBLEMS HERE IS
03:11PM 2 THAT YOU ARE NOT CLAIMING PROTECTABILITY OF ANY INDIVIDUAL WORD.
03:11PM 3 SO IT'S ONLY THE PROCESS OF COMBINING WORDS.

03:12PM 4 MR. PAK: CORRECT.

03:12PM 5 THE COURT: AND SO WORD "CHOICE" IS NO LONGER, IS IT
03:12PM 6 REALLY ON THE TABLE, WORD CHOICE?

03:12PM 7 MR. PAK: ABSOLUTELY, YOUR HONOR.

03:12PM 8 THE COURT: BUT THEN YOU ARE SEEKING PROTECTION OF
03:12PM 9 THE WORD INVENTORY.

03:12PM 10 MR. PAK: NO. WE ARE SAYING WORD CHOICE IN THE
03:12PM 11 SEQUENCING, THAT'S WHY THE "SHOW INVENTORY" IS SO IMPORTANT,
03:12PM 12 BECAUSE ONCE YOU DECIDED THAT HE'S GOING TO PUT IT UNDER
03:12PM 13 "SHOW," HE REALIZED THAT SHOW COMMAND IS SUCH A BROAD COMMAND
03:12PM 14 THAT COVERS ALL KIND OF FUNCTIONALITY.

03:12PM 15 IF YOU PICK THE INDUSTRY STANDARD TONE OF IDENTITY --

03:12PM 16 THE COURT: THE CHOICE THAT'S MADE ONCE YOU HAVE SHOW
03:12PM 17 SELECTED.

03:12PM 18 MR. PAK: EXACTLY.

03:12PM 19 THE COURT: BUT WHY ISN'T THAT PART OF THE HIERARCHY?

03:12PM 20 MR. PAK: BECAUSE THAT IS THE WORD CHOICE.

03:12PM 21 THAT IS THE WORD CHOICE WE ARE TALKING ABOUT BECAUSE YOU
03:12PM 22 KNOW THE HIERARCHY IS GOING TO BE SHOW. YOU KNOW, IT'S THE
03:12PM 23 SECOND LEVEL IN THE HIERARCHY. BUT BECAUSE SHOW HAS SUCH BROAD
03:12PM 24 FUNCTIONALITY, IT COVERS ALL KINDS OF FEATURES IN THE SYSTEM.

03:12PM 25 IF HE HAS SELECTED THE WORD IDENTITY, EVEN IF IT THAT COMES

03:12PM 1 FROM AN INDUSTRY STANDARD DOCUMENT, THAT WOULD CAUSE CONFLICT
03:12PM 2 OR CONFUSION OF THE MIND OF THE USER BECAUSE "SHOW" CAN BE USED
03:13PM 3 WITH A LOT OF DIFFERENT FEATURES.

03:13PM 4 HAD HE DECIDED A DIFFERENT HIERARCHY, IF HE SAID MODULE, I
03:13PM 5 HAVE NO DOUBT THAT HE COULD HAVE DONE MODULE AND THEN
03:13PM 6 "IDENTITY" IN THE CONTEXT OF A MODULE, HIERARCHY SELECTION, THE
03:13PM 7 WORD CHOICE "IDENTITY" COULD HAVE MADE MORE SENSE.

03:13PM 8 SO THE WORD CHOICES, AS YOU BUILD OUT, THESE COMBINATIONS,
03:13PM 9 ARE BEING MADE IN THE CONTEXT OF HIERARCHY. AND WE HAVE,
03:13PM 10 YOUR HONOR, I HAVE, WE DON'T HAVE THAT TIME TODAY. BUT I HAVE
03:13PM 11 E-MAILS OF DEBATES AND PEOPLE ARGUING ABOUT THESE VERY ISSUES
03:13PM 12 THAT WE ARE TALKING ABOUT.

03:13PM 13 WE CREATE A NEW HIERARCHY, IF WE DO, WHAT IS IT, IF WE USE
03:13PM 14 AN EXISTING HIERARCHY, WHAT WORD DO WE USE. OH, NO, YOU CAN'T
03:13PM 15 USE THAT WORD BECAUSE NOW WE ARE IN THE "SHOW HIERARCHY," AND
03:13PM 16 SO IT MAY CAUSE CONFUSION WITH OTHER WORDS OR CONCEPTS THAT ARE
03:13PM 17 UNDER THAT GENERAL UMBRELLA WHICH IS THE SHOW HIERARCHY.

03:13PM 18 SO THIS IS AGAIN GOING BACK TO WE REALLY CAN'T LOOK AT
03:14PM 19 THINGS IN ABSTRACT AND SAY ALTHOUGH WE'VE DONE IT FOR
03:14PM 20 CONVENIENCE SAKE BECAUSE THE LEGAL ARGUMENTS ARE STRUCTURED IN
03:14PM 21 UPPER TERMS OF THESE CATEGORIES.

03:14PM 22 WE CAN LOOK AT COMMAND EXPRESSIONS, THE HIERARCHY, THE
03:14PM 23 DOCUMENTATION AND SO FORTH. BUT THE CREATIVE PROCESS DOESN'T
03:14PM 24 WORK THAT WAY. THE CREATIVE PROCESS IS SAYING WHAT ARE SOME
03:14PM 25 HIERARCHICAL DECISIONS I NEED TO MAKE, WHAT ARE SOME WORD

03:14PM 1 CHOICES I NEED TO MAKE. WHAT ARE THE OTHER TYPES OF THINGS
03:14PM 2 THAT GO INTO THE OVERALL STRUCTURE AND ORGANIZATION? AND WE
03:14PM 3 REALLY CAN'T IGNORE ALL OF THAT HISTORICAL RECORD.

03:14PM 4 THE COURT: SO THEN DO WE INSTRUCT THE JURY THAT THE
03:14PM 5 COMMANDS, THE PROTECTABLE ELEMENT IS THE WORD CHOICE?

03:14PM 6 MR. PAK: WE COULD SAY THAT, YOUR HONOR.

03:14PM 7 AND I THINK IF YOUR HONOR WERE TO GIVE A SEPARATE
03:14PM 8 INSTRUCTION ON THE HIERARCHY, WE COULD TALK ABOUT THAT AS WELL.

03:14PM 9 BUT I REALLY THINK WHEN YOU HEAR THE TESTIMONY YOU WILL
03:14PM 10 HEAR, AND I'M HAPPY TO GO THROUGH IT AGAIN AS I MENTIONED,
03:14PM 11 THERE'S A LOT OF TESTIMONY, A LOT OF DOCUMENTS THAT TALK ABOUT
03:14PM 12 THE INTERPLAY BETWEEN THESE HIERARCHICAL CHOICES, THE WORD
03:15PM 13 CHOICES AND ALL OF THAT.

03:15PM 14 THE COURT: ALL RIGHT. WE NEED TO TAKE A BREAK, IT'S
03:15PM 15 JUST GOTTEN TO BE TOO LONG FOR THE COURT REPORTER.

03:15PM 16 MR. NELSON: CAN WE PICK UP RIGHT THERE, BECAUSE I
03:15PM 17 HAVE A SUGGESTION.

03:15PM 18 THE COURT: YES, WE CAN. LET'S TAKE A TEN-MINUTE
03:15PM 19 BREAK.

03:15PM 20 (WHEREUPON A RECESS WAS TAKEN.)

03:27PM 21 THE COURT: YOU KNOW, MR. NELSON, LET ME JUST PICK UP
03:27PM 22 BECAUSE WE WERE GOING TO PICK UP WHERE WE LEFT OFF BEFORE THE
03:27PM 23 BREAK.

03:27PM 24 I DON'T WANT TO MISCONSTRUE THE PROCESS THAT CISCO ENGAGED
03:27PM 25 IN, AND SO WHERE IT MIGHT SEEM LOGICAL TO ME THAT THE HIERARCHY

03:27PM 1 CAME FIRST AND THE COMMAND LINE WAS A BYPRODUCT, THAT MIGHT NOT
03:27PM 2 BE CORRECT.

03:27PM 3 SO OF COURSE I'M IN THE DARK HERE, AND I DO SEE OVERLAP, SO
03:27PM 4 I REALLY WANT TO HEAR FROM YOU WHETHER I'VE GOT THE PROCESS
03:27PM 5 BACKWARDS, PERHAPS.

03:27PM 6 MR. NELSON: WELL, IN CERTAIN INSTANCES AND OTHER
03:28PM 7 INSTANCES THE HIERARCHY WOULD BE THERE AND THEN THERE'S A
03:28PM 8 CHOICE MADE AS TO WHETHER YOU ARE GOING TO BE CONSISTENT.

03:28PM 9 SO IN OTHER WORDS, THERE WAS NO HARD AND FAST RULE WITH
03:28PM 10 RESPECT TO THAT. AND SO IT ISN'T REALLY, IT'S NOT A CHICKEN
03:28PM 11 AND AN EGG ISSUE BECAUSE THERE WOULDN'T ALWAYS BE A CHICKEN AND
03:28PM 12 THERE WOULDN'T ALWAYS BE AN EGG, I DON'T KNOW IF THAT MAKES
03:28PM 13 SENSE. BUT YOU KNOW WHAT I'M SAYING?

03:28PM 14 THE COURT: I DO, YEAH.

03:28PM 15 MR. NELSON: SO THAT, THAT WOULD BE THE EVIDENCE WITH
03:28PM 16 RESPECT TO THIS. BUT LET ME EXPLORE A LITTLE BIT OF
03:28PM 17 YOUR HONOR'S CONCERN HERE AND THEN MAYBE I CAN ADDRESS SOME OF
03:28PM 18 IT.

03:28PM 19 SO IT SEEMS LIKE, AND SURE WE ARE GOING TO ARGUE ABOUT IT,
03:28PM 20 BUT IN TERMS OF THE CREATIVITY HIERARCHIES AND DECIDING, HAVING
03:28PM 21 THAT GO INTO HOW YOU DECIDE THESE STRUCTURES AND HOW IT BECOMES
03:28PM 22 MORE INTUITIVE FOR AN ENGINEER, IT SEEMS LIKE YOU ARE FINE WITH
03:28PM 23 ALL OF THAT AS A CONCEPT.

03:28PM 24 THE COURT: YEAH.

03:28PM 25 MR. NELSON: THAT'S NOT A PROBLEM.

03:28PM 1 THE ONLY QUESTION IS, AS PRESENTED, AND IF I LOOKED AT THAT
03:28PM 2 PROTECTABILITY FILING, YOU LOOK AT IT AND YOU SAY OKAY, YOU'VE
03:29PM 3 GOT THESE 506 COMMANDS, I THINK THAT'S THE RIGHT NUMBER, THEY
03:29PM 4 ARE ALL LISTED HERE, RIGHT. AND THEN YOU HAVE THE HIERARCHIES
03:29PM 5 LISTED, AND IT'S MOST OF THE 506 COMMANDS AGAIN, AND NOW YOU
03:29PM 6 ARE GOING TO PRESENT THAT TO THE JURY.

03:29PM 7 AND NOW TO THE JURY IT LOOKS LIKE, WELL, WAIT A MINUTE,
03:29PM 8 THAT'S TWICE AS MUCH STUFF, RIGHT.

03:29PM 9 SO I UNDERSTAND THAT, AND THAT'S WHY I WAS TRYING TO
03:29PM 10 EXPLAIN WHAT THE DIFFERENCE IS. BUT THE -- WOULD IT BE MORE
03:29PM 11 COMFORTABLE FOR YOUR HONOR IF WHAT WE DID IN TERMS OF THE
03:29PM 12 EVIDENCE ABOUT HIERARCHY, RATHER THAN ASSERTING IT AS AN
03:29PM 13 INDEPENDENT STANDING ALONE ELEMENT, BUT ASSERTED THAT AS PART
03:29PM 14 OF THE EVIDENCE OF THE CREATIVITY AND THE PROCESS THAT GOES
03:29PM 15 INTO THE COMMAND STRUCTURES THAT ARE THERE, AND YOU KNOW THEY
03:29PM 16 CAN EXPLAIN WHEN THEIR COMMANDS, WHEN THEY DECIDED DON'T PUT IN
03:29PM 17 ANY HIERARCHY AT ALL.

03:29PM 18 BUT I DON'T KNOW IF THAT KIND OF THING WOULD TAKE CARE OF
03:29PM 19 THE CONCERN THAT YOUR HONOR IS RAISING BECAUSE IT STRIKES ME
03:30PM 20 THAT WE ARE HAVING THE DISCUSSION, BOTH THE DISCUSSION YOU HAD
03:30PM 21 WITH ME AND WITH MR. KWUN THAT IT ISN'T SO MUCH THE IDEA OF THE
03:30PM 22 HIERARCHIES AND YOUR SPECIFIC HIERARCHIES, IT IS, WAIT A
03:30PM 23 MINUTE, IS THAT REALLY NOW YOU ARE TALKING ABOUT THAT AS PART
03:30PM 24 OF THE PROCESS OF THE COMMANDS AND THE CREATION AND THE
03:30PM 25 ORIGINALITY OF THE COMMANDS AND NOW YOU ARE TALKING ABOUT IT

03:30PM 1 AGAIN IN THE CONTEXT OF THE HIERARCHY. AND I'M THINKING MAYBE
03:30PM 2 TO THE JURY THAT SOUNDS LIKE TOO MUCH.

03:30PM 3 AND SO DOES THAT --

03:30PM 4 THE COURT: I THINK THAT DOES. I WILL WANT TO HEAR
03:30PM 5 FROM MR. KWUN. I THINK THAT REALLY ADDRESSES PART OF HIS
03:30PM 6 ARGUMENT.

03:30PM 7 I MEAN, I KNOW THERE ARE OTHER PARTS TO IT, MR. KWUN, BUT I
03:30PM 8 THINK, I'VE ADDRESSED, THROUGH AN EVIDENTIARY CONSIDERATION,
03:30PM 9 HOW THE HIERARCHY WILL BE PRESENTED TO THE JURY SO THAT THEY
03:30PM 10 DON'T THINK THAT THE SHORTER LIST IS CISCO'S PROTECTABLE
03:30PM 11 PRODUCT.

03:30PM 12 MR. KWUN: YOUR HONOR, I THINK BETWEEN THE TWO OF
03:30PM 13 THOSE --

03:30PM 14 MR. VAN NEST: WELL, WAIT A MINUTE, I'M CONFUSED
03:30PM 15 ABOUT WHAT WAS OFFERED. THAT'S NOT WHAT WAS OFFERED, I DON'T
03:31PM 16 THINK, YOUR HONOR.

03:31PM 17 THE COURT: NO, THAT WAS A DIFFERENT ISSUE.

03:31PM 18 MR. VAN NEST: YEAH. I JUST WANT TO UNDERSTAND
03:31PM 19 WHAT'S BEEN OFFERED.

03:31PM 20 WHAT I UNDERSTAND THAT'S BEEN OFFERED IS, EFFECTIVELY, YOU
03:31PM 21 FILTER OUT THE HIERARCHIES, THEY ARE NOT A SEPARATE CATEGORY
03:31PM 22 BUT THEY CAN PRESENT EVIDENCE OF CREATION OF THE HIERARCHIES AS
03:31PM 23 PART OF THEIR OVERALL CREATIVITY, BUT THEY DON'T HAVE
03:31PM 24 HIERARCHIES AS A SEPARATE BUILDING BLOCK IN THE FIGHT. THAT'S
03:31PM 25 WHAT I UNDERSTOOD MR. NELSON TO BE OFFERING.

03:31PM 1 THE COURT: THAT'S WHAT I UNDERSTOOD WITH MUCH OF THE
03:31PM 2 EVIDENCE OF, THIS IS THE HIERARCHY, THIS IS PART OF OUR
03:31PM 3 PROCESS, BUT OFFERED NOW AS PART OF A FOURTH BUILDING BLOCK,
03:31PM 4 NOT A FOURTH AND FIFTH SEPARATE BUILDING BLOCK.

03:31PM 5 MR. NELSON: YEAH, EXACTLY.

03:31PM 6 I DON'T THINK -- THE ONLY CLARIFICATION I WOULD MAKE THERE,
03:31PM 7 I DON'T THINK IT'S A FILTERING IN THE SENSE OF THAT, BECAUSE
03:31PM 8 FILTERING TO ME IS HERE'S SOMETHING THAT EVIDENCE THAT YOU
03:31PM 9 CAN'T PRESENT.

03:31PM 10 THE COURT: I'M NOT FILTERING. YOU MODIFIED HOW YOU
03:31PM 11 ARE PRESENTING IT SO THAT I DON'T NEED TO FILTER IT BY
03:31PM 12 ADDRESSING THE DEFENSE CONCERNS.

03:31PM 13 MR. NELSON: EXACTLY.

03:32PM 14 THE COURT: OKAY. AND I THINK IT ALL COMES OUT THE
03:32PM 15 SAME FOR MR. VAN NEST BECAUSE NOW THERE WILL BE FOUR BUILDING
03:32PM 16 BLOCKS, EVIDENCE OF THE ROLE OF HIERARCHIES IN CREATING COMMAND
03:32PM 17 LINES, BUT THEY WON'T BE ASKED WHETHER THERE WAS COPYING OF A
03:32PM 18 HIERARCHY, PER SE.

03:32PM 19 MR. VAN NEST: RIGHT.

03:32PM 20 AND WE WON'T BE -- THERE WILL BE NO VERDICT QUESTION ON IT,
03:32PM 21 THERE WILL BE NO -- YEAH.

03:32PM 22 MR. NELSON: WE WEREN'T --

03:32PM 23 MR. VAN NEST: IT'S NOT AN ELEMENT IN THEIR
03:32PM 24 COPYRIGHTED WORK AT THIS POINT.

03:32PM 25 MR. NELSON: WE WEREN'T PROPOSING VERDICT ELEMENTS ON

03:32PM 1 THE --

03:32PM 2 THE COURT: YOU WEREN'T DOING THAT ANY WAY.

03:32PM 3 MR. PAK: RIGHT. THAT WON'T BE ON OUR VERDICT FORM,
03:32PM 4 FOR SURE.

03:32PM 5 MR. VAN NEST: YOUR HONOR, AS LONG AS WE'VE LOST TO
03:32PM 6 BUILDING BLOCK, I DON'T CARE --

03:32PM 7 THE COURT: IT'S A GOOD DAY FOR YOU, MR. VAN NEST.

03:32PM 8 MR. VAN NEST: WHETHER YOU CALL IT FILTERING OR
03:32PM 9 WHATEVER YOU WANT.

03:32PM 10 MR. NELSON: WELL REALLY, I MEAN, IT'S A MATTER --

03:32PM 11 THE COURT: IF I KEEP YOU HERE ALL DAY, I CAN BEAT
03:32PM 12 YOU DOWN AND GET YOU SO EXHAUSTED.

03:32PM 13 MR. NELSON: NO, BUT IT'S A MATTER OF HOW WE PRESENT
03:33PM 14 TO TAKE CARE OF THE CONCERNS.

03:33PM 15 THE COURT: AND TO ME, MR. KWUN MADE A REALLY
03:33PM 16 EXCELLENT POINT ABOUT MAYBE PLUMPING UP THE PROTECTED ELEMENTS
03:33PM 17 AND DOUBLE COUNTING.

03:33PM 18 AND I THINK THIS -- AND AS I SAY, I DON'T THINK ANY OF THE
03:33PM 19 EVIDENCE WILL BE PARTICULARLY DIFFERENT. BUT WHAT THE JURY IS
03:33PM 20 ASKED TO DO WITH IT WILL BE SIGNIFICANTLY DIFFERENT.

03:33PM 21 OKAY. THEN LET'S MOVE ON.

03:33PM 22 MR. VAN NEST: WE HAVE A MODES AND PROMPTS,
03:33PM 23 YOUR HONOR, THAT WE WANTED TO ADDRESS.

03:33PM 24 THE COURT: OKAY.

03:33PM 25 MR. FERRALL: I'M GOING TO TOUCH UPON THIS. I THINK

03:33PM 1 THIS WILL BE THANKFULLY BRIEFER THAN THE OTHER CATEGORIES
03:33PM 2 BECAUSE I THINK THE ISSUE HAS BEEN DISTILLED QUITE A BIT.

03:33PM 3 I THINK THE COURT'S PROCESS OF WHEREBY YOU ASKED CISCO TO
03:33PM 4 IDENTIFY THE PROTECTABLE EXPRESSION GOES A LONG WAY IN THIS.

03:33PM 5 AND I WANT TO START THERE AND JUST CLARIFY A COUPLE OF
03:33PM 6 THINGS. SO THIS IS IN THE SAME SET OF SLIDES WE HANDED UP THIS
03:34PM 7 MORNING. THIS IS AN EXCERPT FROM CISCO'S IDENTIFICATION OF THE
03:34PM 8 PROTECTABLE EXPRESSION. AND THEY REPEATED THIS CHART MULTIPLE
03:34PM 9 TIMES FOR EACH OF THE VARIOUS FLAVORS, IOS XR, ET CETERA. BUT
03:34PM 10 IT'S BASICALLY THE SAME THING.

03:34PM 11 AND I FOUND THIS HELPFUL, THEY CLAIM NO PROTECTION IN
03:34PM 12 INDIVIDUAL MODES, IN PROMPTS. THEY CLAIM PROTECTION IN THE
03:34PM 13 PARTICULAR ARRANGEMENT.

03:34PM 14 AND FRANKLY, I WAS GOING TO COME IN TODAY AND SAY, WELL,
03:34PM 15 THIS THEORETICALLY IS INTERESTING BUT THEY HAVEN'T DESCRIBED
03:34PM 16 WHAT THE ARRANGEMENT IS OR WHAT THE EXPRESSIVE CONTENT IS IN
03:34PM 17 THAT ARRANGE: AND THAT'S STILL THE CASE IN THE DISCLOSURE,
03:34PM 18 THEY HAVEN'T SAID WHAT THE ARRANGEMENT IS.

03:34PM 19 SO MR. NELSON HELPED THAT PROCESS ALONG BY SHOWING AND
03:35PM 20 EXPLAINING WHAT HE MEANS BY THE ARRANGEMENT. BUT YOUR HONOR, I
03:35PM 21 THINK IT'S CLEAR FROM THAT EXPLANATION THAT WHAT HE IS CLAIMS
03:35PM 22 AS AN ARRANGEMENT IS ACTUALLY A METHOD OF OPERATION WHICH
03:35PM 23 COPYRIGHT LAW DOES NOT PROTECT.

03:35PM 24 IN OTHER WORDS, ON THE SCREEN, FIRST OF ALL IT'S IMPORTANT
03:35PM 25 TO UNDERSTAND ON THE USER SCREEN, THESE WORDS DON'T EXIST,

03:35PM 1 OKAY.

03:35PM 2 SO WHAT IS DESCRIBED AS THE MODES OR THE MODE NAMES, THAT'S
03:35PM 3 UNDER THE HOOD. THAT'S CONCEPTUAL ABOUT THE WAY THAT THE
03:35PM 4 SYSTEM OPERATES.

03:35PM 5 THE PROMPT APPEARS ON THE SCREEN, THE ONE, THE POUND SIGN.
03:35PM 6 BUT THE MODE NAMES DON'T APPEAR ON THE SCREEN. AND UNDER THE
03:35PM 7 HOOD, WHAT WE'VE HEARD IS THAT THE ARRANGEMENT THAT IS ASSERTED
03:35PM 8 AS PROTECTED BY COPYRIGHT IS, I THINK MR. NELSON'S WORDS WERE,
03:36PM 9 WELL, A SPECIFIC RELATIONSHIP, HOW THEY INTERRELATE, AND I
03:36PM 10 THINK HE DESCRIBED IT AS A PATH, A PATH OF OPERATION.

03:36PM 11 IN OTHER WORDS, GOING FROM ONE MODE TO THE NEXT MODE TO THE
03:36PM 12 NEXT MODE.

03:36PM 13 NOW THAT SEEMS CLEAR TO ME TO BE AN UN PROTECTABLE METHOD
03:36PM 14 OF OPERATION OR FUNCTION OF THE PROGRAM, NOT SOMETHING
03:36PM 15 EXPRESSIVE.

03:36PM 16 INDEED, I WOULD SAY IF THAT'S PROTECTED UNDER COPYRIGHT,
03:36PM 17 THEN IT SEEMS LIKE CISCO IS ASKING COPYRIGHT TO PREVENT
03:36PM 18 COMPETITORS FROM HAVING MODES THAT YOU PROCEED FROM ONE TO THE
03:36PM 19 NEXT TO THE NEXT.

03:36PM 20 AND I GUESS EVERY OTHER COMPETITOR HAS TO HAVE MODES AT THE
03:36PM 21 SAME LEVEL. BUT YOU GET INTO THIS SORT OF CRAZY WORLD C
03:36PM 22 COPYRIGHT NOW --

03:37PM 23 THE COURT: LET ME, MAYBE MR. NELSON WILL HAVE TO
03:37PM 24 ANSWER THIS, BUT WE'VE GOT USER EXEC, PRIVILEGE EXEC, GLOBAL
03:37PM 25 CONFIGURATION AND INTERFACE CONFIGURATION. AND EACH OF THOSE

03:37PM 1 MODES STANDS FOR A SET OF OPERATIONS OR SOMETHING, I'M NOT
03:37PM 2 ACTUALLY SURE WHAT IT STANDS FOR, THAT IS WHAT THEY'RE CLAIMING
03:37PM 3 IS COPYRIGHTED, THE SPECIFIC, YOU DON'T THINK SO.

03:37PM 4 MR. FERRALL: WELL, LET'S GO TO THE NEXT SLIDE.

03:37PM 5 THE COURT: THIS IS THE ONE I DIDN'T UNDERSTAND. SO
03:37PM 6 I'M STILL LISTENING.

03:37PM 7 MR. FERRALL: YEAH, LET'S GO TO THE NEXT SLIDE.

03:37PM 8 CISCO, THE COURT NEED NOT ADDRESS WHETHER THE IDEA OF
03:37PM 9 MAKING CERTAIN COMMANDS AVAILABLE ONLY IN CERTAIN MODES IS
03:37PM 10 PROTECTABLE. CISCO MAKES NO CLAIM TO THAT.

03:37PM 11 AND I THINK, I SUBMIT YOU CAN LOOK UP AND DOWN IN ECF 552,
03:37PM 12 THE DISCLOSURE OF PROTECTABLE EXPRESSION, THERE'S NO RECITATION
03:37PM 13 THAT UNDER CERTAIN, THE EXEC MODE, HERE ARE THE COMMANDS THAT
03:38PM 14 ARE AVAILABLE, AND UNDER -- THERE'S NO CLAIM TO THAT.

03:38PM 15 SO THAT'S WHY I GO BACK TO THE COURT'S PROCESS, WHICH IS
03:38PM 16 VERY HELPFUL. I MEAN, YOU MADE IT CLEAR WE'VE GOT TO LIVE BY
03:38PM 17 THE RULES, DISCLOSE WHAT YOU CLAIM IS PROTECTED AND THEN WE ARE
03:38PM 18 GOING TO DEAL WHERE THAT. AND NOW WE ARE DEALING WITH THAT.

03:38PM 19 AND WHAT THEY SAID WAS THIS CHART, THIS CHART THAT'S AN
03:38PM 20 ARRANGEMENT, THEY DIDN'T EVEN DISCLOSE THE ARRANGEMENT IN 552,
03:38PM 21 THEY JUST SAID THE ARRANGEMENT AND NOW WE HEAR THE ARRANGEMENT
03:38PM 22 IS A PROCESS.

03:38PM 23 AND I JUST THINK THAT'S PRETTY CLEAR UNDER 102(B),
03:38PM 24 YOUR HONOR, THAT'S EXACTLY WHAT FILTRATION IS ABOUT,
03:38PM 25 DETERMINING THAT COPYRIGHT DOESN'T PROTECT THE FUNCTIONALITY OF

03:38PM 1 A PROGRAM THAT SAYS, WELL, WE ARE GOING TO HAVE DIFFERENT MODES
03:38PM 2 AND WE ARE GOING TO PROCEED STEP-BY-STEP THROUGH THEM. THAT
03:38PM 3 PROVIDES A PATENT-LIKE MONOPOLY ON THE WAY YOU PROCEED FROM ONE
03:38PM 4 MODE TO ANOTHER.

03:38PM 5 AND CLEARLY, COPYRIGHT DOESN'T PROTECT THAT. SO I THINK
03:38PM 6 THAT IS WHERE WE ARE ON MODES AND PROMPTS

03:39PM 7 THE COURT: OKAY. THEN I GUESS I NEED TO HEAR -- AND
03:39PM 8 AGAIN, I'M STILL STRUGGLING TO UNDERSTAND WHAT IT IS YOU ARE
03:39PM 9 SEEKING PROTECTION OF. SO HELP ME OUT HERE.

03:39PM 10 MR. NELSON: OKAY. I WILL GIVE IT A SHOT.

03:39PM 11 SO WE ARE NOT CLAIMING THE IDEA, RIGHT. AND WE ARE NOT
03:39PM 12 CLAIMING THE IDEA JUST AS WE SAID IN THE PAPERS, WE ARE NOT
03:39PM 13 TRYING TO HIDE THE BALL THERE OF THE IDEA THAT THERE MIGHT BE
03:39PM 14 LESS COMMANDS AVAILABLE IN ONE MODE VERSUS ANOTHER, RIGHT.
03:39PM 15 IT'S NOT THAT WAY.

03:39PM 16 WHAT WE ARE CLAIMING IS USER INTERFACE, THIS ASPECT OF THE
03:39PM 17 USER INTERFACE. SO THE SEQUENCE, STRUCTURE AND ORGANIZATION OF
03:39PM 18 THE PROGRAM IS SOMETHING THAT UNDER JOHNSON CONTROLS WE COULD
03:39PM 19 CLAIM.

03:39PM 20 SO IF I HAVE SLIDE -- I THINK IT'S SLIDE 30. AND WE WILL
03:39PM 21 TEST MY MEMORY.

03:39PM 22 THE COURT: WELL SEPARATING OUT WHAT THE A METHOD IS
03:39PM 23 AS OPPOSED TO A SEQUENCE IS A LITTLE BIT DIFFICULT.

03:39PM 24 MR. NELSON: A LITTLE BIT, RIGHT. I THINK
03:39PM 25 MR. FERRALL IS TALKING ABOUT, HE USED THE WORD PATENT-LIKE

03:40PM 1 MONOPOLY. LIKE SAYING HEY, IF YOU HAVE A MODE THAT YOU CAN GO
03:40PM 2 INTO AND THEN GO INTO ANOTHER MODE AND THEN GO INTO ANOTHER
03:40PM 3 MODE AND GO INTO ANOTHER MODE, THAT'S MY --

03:40PM 4 THE COURT: THAT'S JUST A PROGRESSION, THAT WOULD BE
03:40PM 5 A METHOD.

03:40PM 6 MR. NELSON: THAT'S A METHOD, RIGHT.

03:40PM 7 THAT'S NOT WHAT WE ARE CLAIMING AT ALL. WE ARE CLAIMING,
03:40PM 8 THIS IS A USER INTERFACE, THESE SPECIFIC -- THE WAY THEIR USER
03:40PM 9 INTERFACE WAS DESIGNED COPIES OUR, WHICH IS THEY HAVE THESE
03:40PM 10 MODES, THE PROMPTS ASSOCIATED WITH THEM, EXACTLY THE SAME, AND
03:40PM 11 THEY INTERRELATE, THAT'S WHAT WE ARE SAYING, THE RELATIONSHIP
03:40PM 12 BETWEEN THOSE FOUR MODES OF OPERATION IS IDENTICAL, RIGHT.

03:40PM 13 AND WE ARE ENTITLED TO CLAIM THAT UNDER COPYRIGHT BECAUSE
03:40PM 14 THAT'S HOW THE USER INTERFACE -- EXCUSE ME, THE USER INTERFACE
03:40PM 15 IS EXPRESSED.

03:40PM 16 THE COURT: WELL, SO LET'S LOOK AT YOUR COMMAND MODE.
03:40PM 17 SO THOSE ARE JUST LABELS THAT REPRESENT INFORMATION OR OTHER
03:41PM 18 COMMANDS THAT CAN BE OBTAINED IN THAT MODE.

03:41PM 19 MR. NELSON: THAT'S WHY WE'VE ASSOCIATED THE PROMPTS
03:41PM 20 WITH THEM.

03:41PM 21 THE COURT: RIGHT.

03:41PM 22 MR. NELSON: SO YOU HAVE THAT.

03:41PM 23 SO IN THE DOCUMENTATION AND SUCH, IT EXPLAINS WHAT THOSE
03:41PM 24 PROMPTS ARE ASSOCIATED WITH. SO IT'S THOSE SAME MODES. THOSE
03:41PM 25 DON'T APPEAR ON THE SCREEN, THAT'S TRUE. THAT'S WHAT THEY'RE

03:41PM 1 NAMED AND THAT'S HOW THEY ARE DESCRIBED IN THE USER
03:41PM 2 DOCUMENTATION. BUT YOU HAVE THAT SAME SET OF, EXCUSE ME, THE
03:41PM 3 SAME SET OF MODES OF OPERATION, EXACTLY THE SAME FOUR, YOU
03:41PM 4 HAVE -- I MEAN, THEY HAVE ADDITIONAL ONES TOO, BUT WE ARE NOT
03:41PM 5 CLAIMING THOSE THINGS, JUST LIKE THEY HAVE OTHER COMMANDS AND
03:41PM 6 WE ARE NOT CLAIMING THOSE.

03:41PM 7 THE COURT: BUT IS IT THE TITLE USER EXEC THAT YOU
03:41PM 8 ARE CLAIMING IS PROTECTABLE?

03:41PM 9 MR. NELSON: NO, IT'S THAT THOSE MODES, THAT I HAVE
03:41PM 10 THOSE MODES, RIGHT, THEY HAVE THE PROMPTS EXACTLY THE SAME
03:41PM 11 PROMPTS ASSOCIATED WITH THE MODES AND THOSE FOUR MODES ARE
03:41PM 12 INTERRELATED IN EXACTLY THE SAME MANNER. THAT'S WHAT WE ARE
03:42PM 13 CLAIMING, WHICH IS THE SEQUENCE STRUCTURE AND OPERATION OF THE
03:42PM 14 USER INTERFACE.

03:42PM 15 THE COURT: WHAT'S USER EXEC? I'M SORRY.

03:42PM 16 MR. NELSON: USER EXEC IS A PARTICULAR MODE OF
03:42PM 17 OPERATION. IT'S REPRESENTED IN THE USER INTERFACE BY THE
03:42PM 18 CARROT SIGN. IT WILL HAVE THE ROUTER NAME AND CARROT SIGN.

03:42PM 19 THE COURT: OKAY. I UNDERSTAND. YOU PUNCH IN THE
03:42PM 20 CARROT AND YOU GET YOUR END USER EXEC.

03:42PM 21 MR. NELSON: CORRECT.

03:42PM 22 THE COURT: AND USER EXEC GIVES YOU, YOU ARE IN A
03:42PM 23 PARTICULAR MODE OF OPERATION THAT ALLOWS YOU TO DO CERTAIN
03:42PM 24 THINGS.

03:42PM 25 MR. NELSON: THAT'S CORRECT.

03:42PM 1 THE COURT: ARE YOU CLAIMING PROTECTABILITY OF WHAT
03:42PM 2 YOU CAN DO IN THE USER EXEC?

03:42PM 3 MR. NELSON: NO.

03:42PM 4 THE COURT: JUST THE TITLE USER EXEC.

03:42PM 5 MR. NELSON: THE PROMPT ASSOCIATED WITH IT.

03:42PM 6 THE COURT: AND THE PROMPT ASSOCIATED WITH IT?

03:42PM 7 MR. NELSON: RIGHT. AND THEY HAVE THOSE MODES.

03:42PM 8 THE COURT: AND NOT JUST THAT ONE BY ITSELF, BUT THE
03:42PM 9 COMBINATION OF ALL FOUR.

03:42PM 10 MR. NELSON: CORRECT. THE INTERRELATIONSHIP OF ALL
03:42PM 11 FOUR.

03:42PM 12 THE COURT: SO IT'S REALLY JUST, SO IT'S REALLY
03:42PM 13 CLAIMING THE LABELING.

03:42PM 14 MR. NELSON: I MEAN, IN A WAY, YEAH. LABELING THE
03:43PM 15 PROMPTS THAT ARE ASSOCIATED WITH THOSE MODES, RIGHT, AND THE
03:43PM 16 INTERRELATIONSHIP BETWEEN THE --

03:43PM 17 THE COURT: BUT THERE'S ONLY ONE PROMPT ASSOCIATED
03:43PM 18 WITH THAT MODE AM I CORRECT.

03:43PM 19 MR. NELSON: WITH EACH PARTICULAR MODE, THAT'S
03:43PM 20 CORRECT.

03:43PM 21 THE COURT: WITH EACH ONE.

03:43PM 22 OKAY. SO IT'S A PROMPT GETS YOU INTO SOMETHING CALLED USER
03:43PM 23 EXEC.

03:43PM 24 MR. NELSON: WHEN YOU GET INTO USER EXEC, YOU WILL
03:43PM 25 GET THAT PROMPT.

03:43PM 1 THE COURT: WHEN YOU ARE IN USER EXEC, YOU GET THE
03:43PM 2 PROMPT OF THE CARROT?

03:43PM 3 MR. NELSON: CORRECT.

03:43PM 4 THE COURT: I THOUGHT YOU USE THE CARROT TO GET TO
03:43PM 5 USER EXEC.

03:43PM 6 MR. NELSON: NO, YOU LOG IN.

03:43PM 7 SO THAT'S FIRST THING YOU HAVE TO DO IS YOU HAVE TO LOG IN.
03:43PM 8 YOU WILL LOG IN AND IT WILL GET YOU INTO THAT MODE. IT WILL
03:43PM 9 GET YOU THE NAME, SWITCH, DATE, IT'S A GOOD NAME, THEN THAT
03:43PM 10 WILL GIVE YOU THE CARROT SIGN, RIGHT, AND THEN YOU CAN GO FROM
03:43PM 11 THERE.

03:43PM 12 THE COURT: SO A PROMPT, IS THAT -- WHEN YOU GET THE
03:43PM 13 CARROT SIGN, WHAT DO YOU DO?

03:43PM 14 MR. NELSON: THEN YOU CAN TYPE IN, YOU COULD TYPE
03:43PM 15 COMMANDS, YOU KNOW, YOU COULD DO --

03:43PM 16 THE COURT: SO YOU COULD STAY RIGHT THERE IF YOU
03:43PM 17 WANT.

03:43PM 18 MR. NELSON: YOU CAN. YOU CAN DO CERTAIN THINGS --

03:43PM 19 THE COURT: AND THEN YOU USE A PASSWORD TO GET TO THE
03:44PM 20 NEXT ONE IF YOU ARE ELIGIBLE, IF YOU HAVE THE PASSWORD.

03:44PM 21 MR. NELSON: THAT'S CORRECT.

03:44PM 22 WITH THE COMMAND, AND THEN SO ON AND SO ON WITH THE OTHERS.
03:44PM 23 BUT YOU HAVE TO BE IN ONE TO GET TO THE OTHER.

03:44PM 24 THE COURT: SO IF YOU NOT IN USER EXEC, THERE'S NO
03:44PM 25 PASSWORD THAT GETS YOU INTO PRIVILEGED EXEC?

03:44PM 1 MR. NELSON: CORRECT.

03:44PM 2 THE COURT: SO IT'S THAT SEQUENCE YOU ARE CLAIMING?

03:44PM 3 MR. NELSON: YES. WHICH IS AN ELEMENT OF THE USER
03:44PM 4 INTERFACE.

03:44PM 5 SO IT'S NOT -- IT'S NOT A METHOD OF OPERATION. IT'S NOT --
03:44PM 6 IT'S ACTUALLY, IT'S PRETTY STRAIGHTFORWARD, RIGHT. AND THERE'S
03:44PM 7 THOUSANDS OF DIFFERENT WAYS YOU COULD HAVE DONE IT BUT YOU
03:44PM 8 DECIDED TO DO IT THE SAME WAY BECAUSE YOU WANT YOU WANTED TO
03:44PM 9 LOOK JUST LIKE CISCO, SO IT COULD BE A DROP IN REPLACEMENT.

03:44PM 10 SO THAT'S THE REASON FOR THIS. SO IT'S KIND OF THE
03:44PM 11 OPPOSITE OF PATENT LIKE. THEY COULD MAKE AN EASY CHANGE HERE
03:44PM 12 AND NOT DO THIS.

03:44PM 13 THE COURT: UH-HUH. I MEAN, IF THEY JUST CALLED IT
03:45PM 14 SOMETHING ELSE OR USED A DIFFERENT PROMPT.

03:45PM 15 MR. NELSON: YEAH, THEY MAY VERY WELL BE ALL RIGHT.

03:45PM 16 THE COURT: OKAY. BUT PART OF WHAT YOU ARE CLAIMING
03:45PM 17 IS PROTECTED IS THIS SEQUENCE OF, YOU CAN ONLY GET TO PRIVILEGE
03:45PM 18 EXEC ONCE YOU ARE ALREADY IN USER EXEC, THAT'S PART OF THE
03:45PM 19 SEQUENCE. THERE'S NO RANDOM ACCESS TO THESE.

03:45PM 20 MR. NELSON: CORRECT. THAT'S WHAT WE ARE TALKING
03:45PM 21 ABOUT, ABOUT THE ARRANGEMENT.

03:45PM 22 THE COURT: OKAY. YOU CALL IT -- OKAY. AN
03:45PM 23 ARRANGEMENT OR A SEQUENCE.

03:45PM 24 MR. NELSON: YES.

03:45PM 25 MR. PAK: AND YOUR HONOR, WE PROVIDED SOME EVIDENCE

03:45PM 1 AND MR. NELSON SHOWED YOU ON SLIDE 32 OF HIS PRESENTATION.

03:45PM 2 IN OUR KNOW CONFIGURATION DOCUMENTATION WE SAY

03:45PM 3 UNDERSTANDING COMMAND MODES, THE CLI COMMAND MODE STRUCTURE IS
03:45PM 4 HIERARCHICAL.

03:45PM 5 SO HE TALKS ABOUT, ALTHOUGH WE TALKED ABOUT HIERARCHY IN
03:45PM 6 TERMS OF THE COMMAND WORDS, YOU CAN SEE THE HIERARCHY HERE IN
03:46PM 7 THE MODES AS WELL IN THE SENSE YOU START WITH USER EXEC AT THE
03:46PM 8 TOP, FROM THERE IF YOU GET INTO THAT BY LOGGING IN PROPERLY,
03:46PM 9 YOU CAN THEN GET INTO THE OTHER MODES BY ISSUING SUBSEQUENT
03:46PM 10 COMMANDS.

03:46PM 11 SO THERE'S A TOP TO BOTTOM HIERARCHY THAT ALLOWS YOU TO GET
03:46PM 12 IN. AND IT'S NOT RANDOM ACCESS WHERE YOU CAN JUST COME IN AND
03:46PM 13 ENTER INTO A MODE.

03:46PM 14 THAT'S PART OF THE ARRANGEMENT WE REFERRED TO, OUR EXPERT
03:46PM 15 TALKS ABOUT THAT, AND WE THINK THAT'S AN ELEMENT THAT WAS
03:46PM 16 COPIED SO THAT'S PART OF OUR USER INTERFACE.

03:46PM 17 THE COURT: OKAY. THANK YOU.

03:46PM 18 MR. NELSON: THANK YOU.

03:46PM 19 THE COURT: MR. SILBERT, SO NOW -- SORRY,
03:46PM 20 MR. FERRALL.

03:46PM 21 MR. FERRALL: IF I CAN YOUR HONOR, A COUPLE OF
03:46PM 22 IMPORTANT POINTS.

03:46PM 23 AGAIN, I THINK CISCO AND ARISTA REALIZES THE IMPORTANCE OF
03:46PM 24 PLAYING BY THE RULES. AND WHEN MR. PAK GETS UP AND CITES A
03:46PM 25 BUNCH OF COMMAND REFERENCE GUIDES AS NOW THAT'S WHAT THEIR

03:46PM 1 EXPRESSION IS, I THINK WE ALL KNOW THAT THAT'S NOT THE RULES
03:46PM 2 THAT WE ARE PLAYING BY.

03:46PM 3 WHAT THE ARRANGEMENT IS, WHAT WE HEARD IS THE ARRANGEMENT
03:47PM 4 IS A SEQUENCE, AND A SEQUENCE, THE NINTH CIRCUIT HAS MADE CLEAR
03:47PM 5 IN THE BIKRAM CASE, IS NOT PROTECTED. THERE MAY BE A BOOK
03:47PM 6 ABOUT THE SEQUENCE THAT'S PROTECTED, BUT THE SEQUENCE IS NOT
03:47PM 7 PROTECTED.

03:47PM 8 AND THE NAMES OF THESE MODES, TWO OF THEM ARE ADMITTEDLY
03:47PM 9 COPIED FROM PRIOR OPERATING SYSTEMS. NAMES, TWO-WORD NAMES
03:47PM 10 ARE, EVEN BY CISCO AN ADMISSION OF DISCUSSION OF THE WORDS AND
03:47PM 11 SHORT PHRASES DOCTRINE, THEY DON'T DESERVE PROTECTION, THE NAME
03:47PM 12 OF A MODE, I DON'T THINK THEY ARE REALLY CLAIMING MUCH ABOUT
03:47PM 13 THE NAME OF THE MODE.

03:47PM 14 BUT AT THE END OF THE DAY WHAT THEY ARE SAYING IS THAT NO
03:47PM 15 ONE ELSE CAN HAVE A SERIES OF UNDEFINED MODES, BECAUSE THEY
03:47PM 16 HAVEN'T SAID THAT THESE MODES HAVE A CERTAIN CHARACTERISTIC
03:47PM 17 THAT'S PROTECTED, BUT NO ONE CAN HAVE A FOUR UN DEFINED MODES
03:47PM 18 WITH THESE TWO-WORD NAMES, TWO OF THEM WE COPIED FROM SOMEONE
03:48PM 19 ELSE. THAT'S WHAT THEY ARE SAYING THIS COPYRIGHT CLAIM IS
03:48PM 20 ABOUT. AND THAT JUST DOESN'T GO TO A JURY.

03:48PM 21 THE COURT: WELL I HAVE TO GO BACK AND READ THE
03:48PM 22 BIKRAM YOGA CASE, I HAVEN'T READ IT FOR A WHILE.

03:48PM 23 MR. SILBERT: I HAD A HOUSEKEEPING ISSUE, I KNOW IT'S
03:48PM 24 BEEN A LONG DAY, BUT I HAD TWO POINTS TO MAKE.

03:48PM 25 AND WHAT ONE IS, I SAT DOWN PREVIOUSLY AND I WAS CONTENT

03:48PM 1 WHERE BECAUSE WHERE I THOUGHT WE HAD ENDED UP ON NOT CLAIMING
03:48PM 2 PROTECTION AND INDIVIDUAL WORDS, IT WAS MORE THAN WE WANTED OR
03:48PM 3 ASKED FOR, ET CETERA.

03:48PM 4 THE COURT: YEAH.

03:48PM 5 MR. SILBERT: I THEN HEARD A LOT OF ARGUMENT TO THE
03:48PM 6 EFFECT THAT THIS IS CREATIVE BECAUSE WE PICKED THE WORD
03:48PM 7 INVENTORY. WE PICKED THAT PARTICULAR WORD WHICH IS NOT
03:48PM 8 CONSISTENT WITH AT LEAST WHERE I THOUGHT WE HAD ENDED UP ON
03:48PM 9 NOT, THE IDEA THAT THERE'S NOT GOING TO BE A CLAIM OF
03:48PM 10 CREATIVITY IN AN INDIVIDUAL WORD.

03:49PM 11 THE COURT: THAT'S RIGHT.

03:49PM 12 MR. SILBERT: I DON'T KNOW WHERE THAT LEAVES US.

03:49PM 13 THE COURT: WELL, IT'S NOT WRITTEN IN THE PAPERS AND
03:49PM 14 CISCO HAS MADE IT CLEAR THEY ARE NOT CLAIMING PROTECTION IN AN
03:49PM 15 INDIVIDUAL WORD.

03:49PM 16 MR. SILBERT: OKAY. AND THANK YOU WITH THAT.

03:49PM 17 SO HERE'S THE HOUSEKEEPING PROCEDURE ISSUE AND SEAN THIS IS
03:49PM 18 THE ISSUE WE DISCUSSED BEFORE. WHICH IS IT RELATES TO THE
03:49PM 19 DISCLOSURE OF EXHIBITS IN ADVANCE OF WITNESS TESTIMONY.

03:49PM 20 YOUR HONOR'S RULE, WE UNDERSTAND, IS THAT THE PARTIES
03:49PM 21 EXCHANGE OR AT LEAST IDENTIFY THE EXHIBITS THEY ARE GOING TO
03:49PM 22 USE WITH THE WITNESS IN ADVANCE. THE OTHER PARTY CAN THEN FILE
03:49PM 23 A SHORT, IF ANY, BRIEF WITH OBJECTIONS AND WE FULLY UNDERSTAND
03:49PM 24 YOUR HONOR'S ADMONITION ABOUT WHAT'S GOING TO HAPPEN TO ALL OF
03:49PM 25 US IF WE TAKE A LOT OF YOUR TIME TO RESOLVE THESE OBJECTIONS.

03:49PM 1 THE COURT: I TAKE YOUR TIME, IS WHAT IT COMES DOWN
03:49PM 2 TO.

03:49PM 3 MR. SILBERT: EXACTLY, IT'S OUR TIME.

03:49PM 4 AND I THINK PROBABLY MOST IMPORTANTLY, WE ARE NOT TAKING
03:49PM 5 THE JURY'S TIME TOO.

03:49PM 6 THE COURT: THAT'S RIGHT.

03:49PM 7 MR. SILBERT: TO TRY TO RESOLVE A LOT OF OBJECTIONS
03:50PM 8 IN REALTIME.

03:50PM 9 WE HAD TALKED ABOUT A LIMITED EXCEPTION TO THAT PROCEDURE,
03:50PM 10 ASSUMING YOUR HONOR WOULD ACCEPT IT, BUT THERE'S KIND OF A
03:50PM 11 DISAGREEMENT BETWEEN US ABOUT HOW FAR THAT EXCEPTION WOULD GO.
03:50PM 12 CISCO WANTS A BROADER EXCEPTION, ONE THAT I THINK --

03:50PM 13 THE COURT: SO WHAT'S THE --

03:50PM 14 MR. SILBERT: SO HERE IT IS, IT RELATES TO CROSS
03:50PM 15 EXHIBITS.

03:50PM 16 AND THE EXCEPTION WOULD BE, WOULD YOU DISCLOSE IN ADVANCE
03:50PM 17 OR NOT, EXHIBITS ON CROSS-EXAMINATION. THERE ARE SOME
03:50PM 18 PRACTICAL REALITIES HERE.

03:50PM 19 THE COURT: THAT'S REALLY HARD.

03:50PM 20 MR. SILBERT: ONE OF THEM IS WE TALKED ABOUT, WE ARE
03:50PM 21 GOING TO CALL SOMEBODY, SAY, WE TELL CISCO TWO DAYS IN ADVANCE,
03:50PM 22 HERE'S THE PERSON WE ARE GOING TO CALL, WE IDENTIFY THE
03:50PM 23 EXHIBIT.

03:50PM 24 THE NEXT DAY THEY FILE THEIR OBJECTIONS TO THE EXHIBITS.
03:50PM 25 BUT THEY'VE ONLY HEARD ON, IF WE ARE CALLING THEM ON WEDNESDAY,

03:50PM 1 THEY'VE HEARD ON MONDAY NIGHT WE ARE CALLING THEM AND WE FILE
03:50PM 2 THE THINGS ON TUESDAY NIGHT.

03:50PM 3 THEY DON'T KNOW THE SCOPE YET OF WHAT WE ARE GOING TO ASK
03:51PM 4 THE PERSON, THEY DON'T KNOW WHAT THEY ARE GOING TO CROSS THE
03:51PM 5 PERSON ABOUT. THEY HAVE LESS TIME THAN WE DO TO COLLECT THE
03:51PM 6 EXHIBITS.

03:51PM 7 SO THAT MADE SENSE TO US, AND I THINK I CAN SAY THAT AT
03:51PM 8 LEAST THAT FAR, MADE SENSE TO CISCO TOO AS AN EXCEPTION.

03:51PM 9 THAT PART WOULD BE AN AGREED PROPOSAL TO YOUR HONOR AS AN
03:51PM 10 EXCEPTION TO THE PROCEDURE.

03:51PM 11 THE COURT: SO HOW WOULD I -- WHEN WOULD YOU HAVE THE
03:51PM 12 OPPORTUNITY TO SUBMIT YOUR OBJECTIONS TO THE CROSS-EXAMINATION
03:51PM 13 EXHIBITS?

03:51PM 14 MR. SILBERT: OUR PROPOSAL, AND YOU MAY NOT LIKE IT,
03:51PM 15 BUT OUR PROPOSAL WAS WITH THAT LIMITED SET OF EXHIBITS, IT
03:51PM 16 WOULD BE ON THE FLY.

03:51PM 17 THE COURT: SO I'M MORE THAN GLAD TO DO THAT AND, YOU
03:51PM 18 KNOW THE CLOCK DOESN'T STOP. AND SO YOU ARE TAKING THAT ON
03:51PM 19 YOURSELVES, WHICH IS FINE WITH ME. IT'S REALLY FINE. AND SO I
03:51PM 20 DON'T HAVE A PROBLEM WITH THAT.

03:51PM 21 AND SO IN CERTAIN WAYS, THAT DOES HELP. I RECOGNIZE THE
03:51PM 22 VAST DIFFICULTY OF ORGANIZING YOUR CROSS-EXAMINATION, SOME OF
03:52PM 23 IT'S DONE AND SOME OF IT CHANGES.

03:52PM 24 MR. SILBERT: WE DON'T KNOW WHAT THEY ARE GOING TO
03:52PM 25 ASK. WE ARE LIMITED TO WHAT THEY ASK AND WE DON'T KNOW WHAT --

03:52PM 1 THE COURT: AND YOU MAY PUT TOGETHER A BINDER WITH
03:52PM 2 MANY EXHIBITS THAT I NEVER NEED TO RULE ON. AND SO THERE'S
03:52PM 3 BEEN A LOT OF TIME DEVOTED TO ARGUING EXHIBITS THAT YOU CHOOSE
03:52PM 4 NOT TO USE. BECAUSE MOST WITNESSES GET BINDERS LIKE THIS AND
03:52PM 5 SMALL AMOUNTS THAT ARE ACTUALLY GOING TO BE USED AND THEY JUST
03:52PM 6 NEED TO BE PREPARED.

03:52PM 7 AND I DON'T HAVE A PROBLEM WITH THAT. AND I WILL DO -- I
03:52PM 8 MEAN, THE BURDEN FALLS ON YOU TO MAKE IT CLEAR WHAT YOU ARE
03:52PM 9 ARGUING AT THE TIME BECAUSE OF COURSE I DON'T KNOW YOUR
03:52PM 10 EXHIBITS AND I WON'T HAVE SEEN THEM.

03:52PM 11 MR. SILBERT: YES.

03:52PM 12 SO HERE'S THEN WHERE THERE'S A DISAGREEMENT. CISCO'S
03:52PM 13 POSITION WOULD BE THAT SAME RULE, THE NO DISCLOSURE IN ADVANCE
03:52PM 14 PROCEDURE, WOULD APPLY IF THEY CALL SOMEONE, SAY AN ARISTA
03:52PM 15 EMPLOYEE, IN THEIR CASE. IT'S NOT STRICTLY CROSS, IT'S THEY'RE
03:52PM 16 CALLING THE PERSON.

03:52PM 17 THE COURT: I DON'T SEE THAT WORKING.

03:52PM 18 MR. SILBERT: WE DON'T EITHER.

03:52PM 19 THE COURT: BECAUSE I THINK THEY HAVE ALL THE TIME,
03:53PM 20 THEY ARE CALLING THE WITNESS, NOTIFYING YOU THAT WITNESS WILL
03:53PM 21 BE COMING. I THINK THAT'S MORE ORDERLY. FRANKLY, YOU SHOULD
03:53PM 22 PROTECT YOUR OWN CLOCK HERE.

03:53PM 23 SO I WOULD NOT THINK THAT THAT WOULD BE THE SAME CATEGORY.
03:53PM 24 BUT CERTAINLY ON THE CROSS-EXAMINATION, HOPEFULLY IT WILL
03:53PM 25 REDUCE THE NUMBER OF OBJECTIONS BECAUSE YOU WILL ALSO BE

03:53PM 1 PARADING YOUR OBJECTION IN FRONT OF THE JURY, WHICH MAY MODIFY
03:53PM 2 YOUR WILLINGNESS TO DO THAT.

03:53PM 3 AND THEN WE DO THEM AT SIDEBAR OR WE EXCUSE THE JURY. AND
03:53PM 4 IT'S RARE THAT WE EXCUSE THE JURY FOR A DISCUSSION OF AN
03:53PM 5 EXHIBIT. SO I'M SURE THAT WON'T BE A PROBLEM.

03:53PM 6 MR. SILBERT: OKAY. THAT'S ALL I HAD.

03:53PM 7 THANK YOU VERY MUCH, YOUR HONOR.

03:53PM 8 THE COURT: ALL RIGHT. THAT TAKES CARE OF THAT.

03:53PM 9 ALL RIGHT. WELL, WE WORKED THROUGH QUITE A BIT TODAY THAT
03:53PM 10 I THINK WILL BE FOUND IN OUR JURY INSTRUCTIONS AS WE TALK ABOUT
03:53PM 11 THEM TOMORROW.

03:53PM 12 MR. VAN NEST: SOUNDS GREAT, YOUR HONOR.

03:53PM 13 THE COURT: WELL, THANK YOU.

03:53PM 14 YOU HAVE ALL BEEN VERY PATIENT WITH ME IN HELPING ME TO
03:53PM 15 UNDERSTAND THIS.

03:53PM 16 I THINK BACK TO A LOT OF COMMENTS MADE BY JUDGE ALSUP WHEN
03:54PM 17 HE GRAPPLED WITH THIS, IT'S VERY CHALLENGING FOR A JUDGE TO
03:54PM 18 UNDERSTAND YOUR CASE BEFORE WE'VE HEARD THE EVIDENCE. AND SO
03:54PM 19 I'M PLAYING CATCH UP, AND YOU'VE REALLY HELPED ME QUITE A BIT.

03:54PM 20 TOMORROW IF WE COULD ASSEMBLE AT 9:30. I HAVE A TRO
03:54PM 21 TOMORROW MORNING THAT I NEED TO DO AT 9:00. I DON'T NEED YOU
03:54PM 22 TO BE WAITING.

03:54PM 23 AND IT'S MY PREFERENCE TO DO THAT IN CHAMBERS
03:54PM 24 OFF-THE-RECORD. IF THAT'S NOT WORKING FOR YOU, WE CAN COME
03:54PM 25 BACK AND BE ON THE RECORD, BUT IT REALLY SLOWS THINGS DOWN.

03:54PM 1 MR. VAN NEST: IT WORKS FOR US, YOUR HONOR. I THINK
03:54PM 2 I'M SPEAKING FOR EVERYBODY.

03:54PM 3 THE COURT: OKAY. THANK YOU FOR THAT.

03:54PM 4 GOOD. AND MR. PAK YOU, YOU HAVE YOUR OWN VERSION OF JURY
03:54PM 5 INSTRUCTION NUMBER 12?

03:54PM 6 MR. PAK: YES, WE DO, YOUR HONOR.

03:54PM 7 LET US TAKE A LOOK AT -- WE DIDN'T HAVE A CHANCE TO FULLY
03:54PM 8 CONSIDER YOUR COMMENTS IN LIGHT OF WHAT THEY FILED. THERE'S A
03:54PM 9 POSSIBILITY THAT WE COULD WORK OFF THEIR MODEL AND MAYBE
03:54PM 10 FURTHER --

03:54PM 11 THE COURT: MAYBE I WILL JUST LEAVE THAT FOR THE
03:54PM 12 MORNING. AND I READ IT, BUT I DIDN'T HAVE ANYTHING TO COMPARE
03:54PM 13 IT TO.

03:54PM 14 MR. PAK: WE WILL FILE THAT TONIGHT AND BRING COPIES
03:55PM 15 WITH US. WE WILL TRY TO ADD TO WHAT THEY DID AND MAYBE MAKE IT
03:55PM 16 A LITTLE BIT MORE, FROM OUR PERSPECTIVE, BALANCED BUT WE WILL
03:55PM 17 TRY TO MAKE THEM COPIES.

03:55PM 18 THE COURT: THAT'S GREAT. AND I THINK IT WAS ARISTA
03:55PM 19 WHO WAS PREPARING THE JURY INSTRUCTIONS.

03:55PM 20 WHAT I WILL NEED -- WELL, IT CAN BE OVER THE WEEKEND, BUT I
03:55PM 21 WILL NEED THAT CLEAN SET THAT I CAN READ FROM OF THE
03:55PM 22 PRELIMINARY INSTRUCTIONS. AND I LIKE TO GET THEM BEFORE THAT
03:55PM 23 MORNING SO THAT I CAN READ THROUGH AND MAKE SURE THAT I AM
03:55PM 24 COMFORTABLE WITH THEM.

03:55PM 25 SO I DON'T KNOW WHO IS PREPARING THOSE, BUT RIGHT NOW I

03:55PM 1 STILL HAVE THE ANNOTATED ONES, CORRECT?

03:55PM 2 MR. VAN NEST: WE WERE DOING THAT, YOUR HONOR.

03:55PM 3 THE COURT: GREAT.

03:55PM 4 MR. VAN NEST: I UNDERSTAND WE ARE GOING TO RESOLVE
03:55PM 5 ALL OF THAT TOMORROW.

03:55PM 6 THE COURT: YES.

03:55PM 7 MR. VAN NEST: AND THEN IT'S JUST A MATTER OF
03:55PM 8 PROCESSING IT AND GETTING IT TO YOU. BY CLEAN YOU MEAN WITHOUT
03:55PM 9 THE ARGUMENT AND CITES.

03:55PM 10 THE COURT: THAT'S RIGHT. AND IT WON'T SAY ARISTA'S
03:55PM 11 PROPOSED, OR IT WILL JUST BE WHAT THE JURY SEES.

03:55PM 12 MR. VAN NEST: RIGHT.

03:55PM 13 THE COURT: SO I WILL JUST HAVE THE FIRST SET OF
03:55PM 14 PRELIMINARY.

03:55PM 15 MR. VAN NEST: THAT'S RIGHT.

03:55PM 16 THE COURT: IN FINAL FORM.

03:55PM 17 MR. VAN NEST: THAT'S RIGHT. AND IT WILL BE A LOT
03:55PM 18 SHORTER THAN WHAT JUDGE ALSUP GAVE TOO.

03:55PM 19 THE COURT: THAT'S HARD TO IMAGINE AFTER WHAT I'VE
03:56PM 20 BEEN READING.

03:56PM 21 MR. VAN NEST: WELL, WE WILL WAIT AND SEE.

03:56PM 22 THE COURT: FROM THE FIRST TRIAL, YOU MEAN.

03:56PM 23 MR. VAN NEST: MAYBE FROM EITHER.

03:56PM 24 THE COURT: OKAY. I GUESS I ONLY SAW THE SYNOPSIS
03:56PM 25 ONES, MAYBE THOSE WERE THE ONLY ONES I PRINTED OUT.

03:56PM 1 MR. VAN NEST: IN EITHER EVENT, WE WILL DO THE
03:56PM 2 PROCESSING, YOUR HONOR.
03:56PM 3 THE COURT: I APPRECIATE THAT. I THANK YOU SO MUCH.
03:56PM 4 ALL RIGHT. THEN I WILL SEE YOU ALL AT 9:30 TOMORROW.
03:56PM 5 (WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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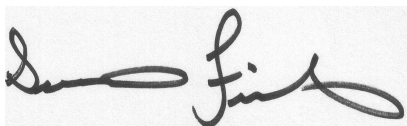
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 11/21/16